Supreme Court, U. S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

VOLUME I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

No. 79-1127

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

PETITION FOR CERTIORARI FILED
JANUARY 21, 1980
CERTIORARI GRANTED
MARCH 17, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 28, 1973 — Indictment issued by the Grand Jury of Dallas County, Texas.

Mar. 11, 1973 — Jury voir dire commenced.

Mar. 25, 1973 — Jury trial commenced on plea of not guilty to capital murder.

Mar. 26, 1973 — Jury returned verdict of guilty to capital murder.

Mar. 26, 1973 — Punishment hearing commenced.

Mar. 26, 1973 — Jury returned verdict of "yes" to each of the three special issues. Punishment set by the court at death.

Feb. 18, 1976 — Opinion of Texas Court of Criminal Appeals affirming conviction and sentence.

July 14, 1976 — Appellant's motion for rehearing overruled. Prior dissenting opinions withdrawn.

Oct. 20, 1976 — Smith sentenced to be executed on November 22, 1976.

Nov. 6, 1976 — Stay of execution pending timely filing of petition for writ of certiorari granted by Mr. Justice Powell.

Mar. 7, 1977 — Certiorari denied.

Mar. 22, 1977 — Smith sentenced to be executed on April 26, 1977.

Apr. 18, 1977 — Application for state writ of habeas corpus filed.

Apr. 20, 1977 — State writ of habeas corpus denied.

Apr. 21, 1977 — Petition for Writ of Habeas Corpus by a person in state custody filed in United States District Court, Dallas Division, CA-3-77-0544-F.

Apr. 22, 1977 — Stay of execution pending further order of the court granted by Robert W. Porter, United States District Judge.

Apr. 29, 1977 — Show cause order filed and report requested from Petitioner detailing factual issues.

May 23, 1977 — Respondent's Motion to Dismiss and Answer filed along with Texas Court of Criminal Appeals records.

Aug. 25, 1977 — Letter from counsel for Petitioner setting forth factual issues disputed.

Oct. 6, 1977 — Letter from court to Petitioner's counsel requesting affidavits with copy to Respondent's attorney.

Oct. 12, 1977 — Filed Affidavits of John F. Simmons and Howard G. Wilson.

Oct. 21, 1977 — Filed Affidavit of Judge R. T. Scales.

Dec. 21, 1977 — Letter of John F. Simmons confirming telephone request for additional affidavit.

Dec. 21, 1977 — Filed Affidavit of John F. Simmons.

Dec. 30, 1977 — Filed Memorandum Opinion and Final Judgement vacating death sentence.

Jan. 9, 1978 — Filed Respondent's Motion for New Trial.

Feb. 10, 1978 — Filed Petitioner's Response in Opposition to Respondent's Motion for New Trial.

Mar. 27, 1978 — Filed Order denying Respondent's Motion for New Trial.

Apr. 4, 1978 — Filed Notice of Appeal by W. J. Estelle, Jr., Director, Texas Department of Corrections and Motion for Stay of Order.

Apr. 18, 1978 — Original case papers mailed to Court of Appeals with Transcript and State Court Records.

Sept. 13, 1979 — Opinion of United States Court of Appeals for the Fifth Circuit affirming United States District Court.

Oct. 22, 1979 — Rehearing and Rehearing En Banc denied.

IN THE 195th JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

No. C 73-12659 IN

[Record on Appeal (hereafter "Rec."), page 21]

Motion To List State's Witnesses —
Filed January 4, 1974

TO THE HONORABLE JUDGE OF THE COURT:

The Defendant in the above styled and numbered cause moves this Honorable Court to order the Attorney representing the State of Texas in this cause to list on the back of the indictment all of the State's witnesses upon whose testimony the indictment was found for the reason that the Defendant has no way of knowing the identity of witnesses appearing before the Grand Jury and no other means of knowing upon whose testimony the indictment was returned other than the complaint.

I.

The Defendant further moves this Court to order the Attorney representing the State of Texas in this cause to list all the State's witnesses whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state and the punishment stage, for the reason that the Defendant has no way of knowing the existence of any relationships between such witnesses and the prospective jurors and the Defendant cannot make an intelligent use of his peremptory challenges without such knowledge.

WHEREFORE, PREMISES CONSIDERED, Defendant moves the Court to grant this Motion in all things.

Respectfully submitted,
/s/ John F. Simmons,
Attorney for Defendant
1113 Davis Building
Austin, Texas 75202
747-1133

ORDER

On this the _____ day of _____, _____, the foregoing Motion was presented in open court and the request to list all the State's witnesses whom the State expects to use during the guilt or innocence stage is (GRANTED) ~~(DENIED)~~ to which action of the Court the defendant then and there excepted in open court.

/s/ R. T. Scales
JUDGE

ORDER

On this the _____ day of _____, 19____, before the trial has commenced, the foregoing Motion was presented in open court and the request to list all the State's witnesses whom the State expects to use during the punishment stage is (GRANTED) ~~(DENIED)~~ *if known* to which action of the Court the defendant then and there excepted in open Court.

/s/ R. T. Scales
JUDGE

ORDER

After the jury returned a verdict of guilty but prior to the hearing on punishment the foregoing Motion with respect to the request to list the State's witnesses whom the State expects to use during the punishment stage was again presented in open Court which is (GRANTED) (DENIED) to which action of the Court the defendant then and there excepted in open court on this the _____ day of _____, 19____.

_____
JUDGE

* * *

[Rec. 24]

February 28, 1974

Honorable R. T. Scales, Judge
195th Judicial District Court
4th Floor
Dallas County Government Center
Dallas, Texas 75202

Re: Ernest Benjamin Smith, Jr.

Dear Judge Scales:

The following is a summary of the psychiatric evaluation of Ernest Benjamin Smith, Jr. which took place on the eighth floor of the Dallas County Jail on 2/18/74.

GENERAL APPEARANCE & BEHAVIOR: Mr. Smith is a 26-year old colored male. He had pigtails, mustache, goatee, mole in his right temporal area, birthmark over his left cheek and a small tattoo on his left hand. His behavior was normal.
PRODUCTION OF SPEECH: He was able to reach goal ideas easily.
AFFECT & MOOD: There were no guilt feelings.
CONTENT OF THOUGHT: Mr. Smith was able to discuss the charges against him with me. He was able to give historical information. No delusions nor hallucinations were elicited.
SENSORIUM: He was oriented to time, place and person. He is of average intelligence.

In conclusion, it is my opinion that Earnest Benjamin Smith, Jr. is aware of the difference between right and wrong and is able to aid an attorney in his defense. If I can be of any further help to you regarding this case, please let me know. He is a severe sociopath.

Sincerely,
/s/ James P. Grigson, M.D.

JPG/cc

* * *

[Rec. 25]

List of Witnesses — Filed March 11, 1974

1. Louie Anderson
2. Troy Brown
3. E. C. Carlan
4. Wes Cason
5. L. C. Caudell
6. Joe Chasteen
7. J. C. Day
8. B. J. Haston
9. N. D. Emberlin
10. C. E. Lewis
11. James Mitchell
12. C. O. Prewitt
13. Milton Rankin
14. J. A. Reeves
15. Andrew Swift
16. Faye Spruill
17. George Wheeler
18. John Wilson

Copy given to deft. attorney

A-8

Form 391-Application for Subpoena in the District Court

TO THE CLERK OF THE CRIMINAL DISTRICT COURT ..... OF DALLAS COUNTY, TEXAS:

In The Case of THE STATE OF TEXAS vs. Ernest Ben Smith

No. C73-12659 charged with Capital Murder

..... Date set for trial

you will please issue subpoena in accordance with the law, for the following named witness residing in the County, as set out:

1. Book-in records custodian Dallas Sheriff's
whose vocation is that of residing in , County, Texas, ~~and whose location is~~ record of visitation of Dr Grigson to Ernest Ben Smith

2. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

3. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

4. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

5. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

6. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

7. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

8. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

9. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

10. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

The testimony of said witness is believed to be material to the ~~State~~ Defendant.

John F. Simmons

SWORN TO AND SUBSCRIBED before me, this 25 day of March A. D. 19 74

MAR 25 1974

BILL SHAW

Clerk, Criminal District Court ..... Dallas County, Texas.

By ..... Deputy

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* * *

[Rec. 66]

NO. C73-12659 IN

THE STATE OF TEXAS	)	IN THE 195th JUDICIAL
VS.	)	DISTRICT COURT OF
ERNEST BEN SMITH	)	DALLAS COUNTY, TEXAS

Defendant's Motion In Limine —
Filed March 25, 1977

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW defendant and objects in advance to the testimony of any witness to testify in the State's case-in-chief whose name is not listed on the State's list of witnesses, and asks that the State of Texas not put such a witness on the witness stand.

I.

Prior to jury selection, defendant made a motion that the State be required to list *all* its witnesses to be used *on its case in chief*, "for the reason that the defendant has (SIC) no way of knowing the existence of any relationships between the witnesses and prospective jurors . . . ." This Motion was granted. The State did in fact file and present a list of witnesses to defense counsel.

WHEREFORE, defendant prays that this Motion be granted,

Respectfully Submitted,
JOHN F. SIMMONS,
HOWARD G. WILSON
Attorneys for Defendant
by /s/ John F. Simmons

ORDER

This Motion is (Granted) ~~(Denied)~~.

/s/ R. T. Scales
JUDGE

NO. C-73-12659-IN

THE STATE OF TEXAS	)(	IN THE 195TH JUDICIAL DISTRICT
VS.	)(	COURT OF DALLAS COUNTY, TEXAS
ERNEST BENJAMIN SMITH, JR.	)(	JANUARY TERM, A.D., 1974

Statement Of Facts (Hereinafter S/F)

APPEARANCES:

HON. HENRY WADE, Criminal District Attorney, Dallas County, Texas
By: Mr. Steve Tokoly, Assistant District Attorney,
Mr. Doug Mulder, Assistant District Attorney,
Mr. Winfield Scott, Assistant District Attorney, and
Mr. Gerald Banks, Assistant District Attorney,

For the State of Texas;

MR. HOWARD WILSON, Attorney-at-Law,
and
MR. JOHN SIMMONS, Attorney-at-Law,

For the Defendant.

- - -

BE IT REMEMBERED that on the 11th day of March, A.D., 1974, came on to be heard before the HONORABLE R. T. SCALES, Judge of the 195th Judicial District Court of Dallas County, Texas, and a jury, the above entitled and numbered cause at which time the Defendant was arraigned outside the presence of the jury, pled not guilty and whereupon the Indictment was presented in the presence of the jury and the Defendant again pled not guilty, the Rule of Evidence was invoked by the Defendant and the following testimony was adduced from the witness stand and the following proceedings had, to-wit:

* * *

[S/F 2768]

(Whereupon the jury retired to the jury room to deliberate their verdict on the question of guilt or innocence and subsequently returned to the courtroom with their verdict, which was received and accepted by the Court at which time the jury was recessed until 3:30 P.M. and the following proceedings were had outside the presence and hearing of the jury.)

THE COURT: As I understand it, Mr. Mulder, you're going to rest — how do you want to word it? Subject to the right to reopen?

MR. MULDER: Whatever your pleasure is. However, I don't think they're going to know one way or the other. We can do it right now. They can come in, and the Defense and be calling witnesses?

THE COURT: Mr. Simmons?

MR. SIMMONS: I didn't understand.

THE COURT: He doesn't have any testimony right now, but will have.

MR. MULDER: We will rest right now in the record.

THE COURT: Subject to your right to reopen [S/F 2769] if they don't put on any testimony?

MR. TOKOLY: I think since we are permitting them to go first, if they can start putting on their testimony as if that's the normal thing to do, then we will put on our testimony after theirs.

THE COURT: That's fine. Since the State had the right to go first, I wanted to show something in the record concerning your resting at this time.

MR. MULDER: That's fine, Judge, with that understanding.

(Whereupon the jury returned to the courtroom and the following proceedings were had in the presence and hearing of the jury:)

MR. SIMMONS: Judge, at this time we will call Robert Terry Roy.

* * *

[S/F 2782] MR. MULDER: We will call Dr. James P. Grigson.

MR. SIMMONS: May we have a hearing on Dr. Grigson outside the presence and hearing of the jury?

THE COURT: Yes, sir.

Members of the jury, please retire to the jury room.

(Whereupon the jury was retired to the jury room, and the following proceedings were had outside the presence and hearing of the jury.)

THE COURT: Mr. Simmons, what is the purpose of the hearing out of the presence of the jury?

MR. SIMMONS: I think it will take about four questions, and it will be apparent.

THE COURT: Four questions by you or Mr. Mulder?

MR. SIMMONS: By me.

THE COURT: Go ahead.

MR. SIMMONS: First, we want to make a Motion in Limine in advance that the State not be allowed to mention or say that Dr. Grigson was appointed by the Court. We feel like that would be a comment on the weight of the evidence with regard to the jury.

THE COURT: All right.

MR. SIMMONS: Is that motion granted?

[S/F 2783] THE COURT: Yes.

MR. MULDER: We would like to be heard on that. I think it's pertinent.

THE COURT: As to whether or not I appointed him?

MR. MULDER: Yes, sir.

THE COURT: Why?

MR. MULDER: Well, had we gone out and hired the doctor ourselves, it might show some partiality.

THE COURT: If it's not mentioned at all, there will be no partiality.

MR. MULDER: I want to go into it. I think it's material and important. I think they ought to know it.

THE COURT: Well, your objection to it was that it would show partiality on your part.

MR. SCOTT: It would be admissible if we had hired him.

MR. MULDER: The Court is to be impartial. Certainly I can see no impartiality on the Court's part.

MR. SCOTT: If we had hired him, they could bring

that out.

MR. SIMMONS: We understand the Court's impartial, and I know that, and Mr. Scott and Mr. [S/F 2784] Mulder knows it, but our concern is that the jury might feel because the Court had appointed this man as a psychiatrist in this case, that they should give more credence or weight to his testimony than they ordinarily would. We think it would be a comment on the weight of the evidence.

THE COURT: There won't be any comment made.

MR. SIMMONS: If he doesn't mention that the Court appointed Dr. Grigson, there wouldn't, which is our Motion in Limine. In other words, if Mr. Mulder is allowed to say, "Judge Scales appointed this doctor to examine the Defendant," well we think that's a comment on the weight of the evidence in that the jury would have a tendency or be inclined to give it more credence or weight than if they felt like either the State had hired him or the Defendant had hired him.

THE COURT: Well, the truth is that I appointed him, and if he is not asked, then the jury will assume the State hired him.

MR. SIMMONS: We certainly don't intend to ask him and what I'm concerned about is Mr. Mulder asking him directly or saying it in his Argument to the jury.

MR. MULDER: I will ask him directly. I [S/F 2785] wouldn't argue something that wasn't in evidence.

MR. SIMMONS: We certainly think our motion would go to that question, too.

THE COURT: I think if nothing is said, the jury is going to think the State hired him.

MR. MULDER: I don't think there is any question about that.

MR. SIMMONS: The State is presenting him as a witness. They're vouching for him, so whether they hired him or not —

MR. SCOTT: He would have been available to them, also.

THE COURT: I appointed him, and he was available to you if you wanted him. Therefore, I am going to

change my ruling and allow the State to show that he was appointed by the Court.

MR. SIMMONS: Note our exception.

- - -

JAMES P. GRIGSON,

called as a witness by the State, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

VOIR DIRE EXAMINATION

BY MR. SIMMONS:

[S/F 2786] Q. Dr. Grigson, when did you go see Ernest Benjamin Smith?

A. February the 18th, 1974.

Q. And this was some month and five or six days before that — before now?

A. Whatever it is.

Q. Whatever it is? Did Judge Scales request you to go see him?

A. Yes, he did.

Q. Did you ever ask Ernest's attorney or get permission from Ernest's attorney to go?

A. No, sir, I did not.

Q. Did Mr. Mulder talk to you with regard to what he had said — with regard to what Ernest had said to you?

A. He asked me about my findings — wanted a copy of the report. We did discuss some of what was in the evaluation in terms of diagnosis.

Q. Did he tell you at that time, or was there any discussion as to whether or not you had ever talked to Ernest's attorney about whether or not you had permission to see him?

A. No. None that I recall.

Q. Was this at the time he told you you would be called to testify here at trial — to testify in [S/F 2787]

this case?

A. No. I don't think anything was said about that.

Q. When did he tell you?

A. He wanted to know what I found.

Q. When did he tell you that you would be called to testify?

A. Let's see. I only knew I was testifying today about — let's see — 1:45. No, must have been about 2:30. I had seen Mr. Mulder last Thursday, and he said that they had selected a jury and that they were putting on the trial and would probably need me to testify some time this week.

Q. All right. Prior to that — back when you talked to Ernest Benjamin Smith up in the jail or even before that. Did Mr. Mulder tell you to talk to him with regard to coming to court and testifying?

A. No, sir, he didn't.

Q. Just said to go see him and —

A. No. He said — let's see. I'm not sure he said this. I think that Mr. Mulder said, "Judge Scales wants you to examine Ernest Benjamin Smith, Jr. He's charged with murder, armed robbery, or three counts of armed robbery," and I think possession of some kind of drugs or something.

Q. When you sent him your report, did you ever [S/F 2788] discuss this report with him?

A. With —

Q. Your report with him? Mulder, I mean.

A. Yes. I told Mr. Mulder what I had found.

Q. Did he tell you at that time that he wanted you to come to court and testify to it?

A. No. I don't recall him saying, you know, "I want you to come and testify." He said, "All right."

Q. Did he ever indicate that you would be called to testify?

A. Yes. Last Thursday, certainly he said that it looked like, you know, they were getting a jury, and he would probably need me to testify this week.

Q. At the time you talked to him prior to the selection of the jury or back when you talked to the Defendant or

before or after that, did he indicate to you that he wanted you to testify in this case?

A. Now wait a minute. I got lost, Mr. Simmons. Will you state that again?

Q. Any time and any occasions you have discussed with Mr. Mulder this Defendant or the facts of this case, has he ever indicated to you that he wanted you to testify in this case?

MR. MULDER: I'm going to object at this time. We can't see where he's going. What's the [S/F 2789] purpose of his Voire Dire Examination?

MR. SIMMONS: We're outside the presence of the jury.

MR. MULDER: I understand that. But let's have him state his purpose.

MR. SIMMONS: If he will answer the question, we will try to tie it in.

THE COURT: To what?

MR. SIMMONS: To what we are getting at.

MR. MULDER: What's he getting at?

THE COURT: Go ahead and answer the question and he can tell us what he's getting at.

THE WITNESS: Yes, sir. He had requested me to testify.

Q. (By Mr. Simmons) All right. In this case?

A. Yes, sir, he did.

MR. SIMMONS: We move that this testimony — this witness not be allowed to testify in the trial of this case, because we have made a motion that the State's witnesses be listed for their case in chief, and that motion was granted and a part of the motion said any witnesses that they planned to use on punishment, if known, were to be listed on their list of State's witnesses. We think it's apparent from what the witness has said that the Assistant District Attorney [S/F 2790] intended to call Dr. Grigson to testify in this case in the punishment hearing, and therefore, they knew that they were going to use him and his name should have been listed on the list. It was not. We object to his testimony.

THE COURT: Overruled.
MR. SIMMONS: Note our exception.
THE COURT: Any further questions?
MR. SIMMONS: No.
THE COURT: Mr. Simmons, is an hour all right?
MR. SIMMONS: All right.
(Whereupon the jury was returned to the courtroom and the following proceedings were had in the presence and hearing of the jury:)
THE COURT: Members of the jury, out of your presence, this witness was sworn to tell the truth, the whole truth and nothing but the truth, so help him God.

JAMES P. GRIGSON,
called as a witness by the State, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

[S/F 2791] BY MR. MULDER:
Q. You are James P. Grigson?
A. Yes, sir, I am.
Q. And what is your business or profession, please, sir?
A. I'm a medical doctor. I specialize in psychiatry. I am in private practice.
Q. Dr. Grigson, what has been your educational and professional background in the field of medicine?
A. I obtained my M.D. Degree from Southwestern Medical School branch of the University of Texas here in Dallas. Served one year of rotating internship at the Baylor Medical Center; spent three years in approved psychiatric residency training programs, eighteen months at Timberlawn and eighteen months at Parkland Hospital here in Dallas; went into full time teaching in the Department of Psychiatry at the medical school where I taught four and a half years. There was some overlapping. I was consultant to the Terrell State Hospi-

tal System for about two years, and then I was consultant to Texas Women's University Health Center for two years. Then I was consultant to the Dallas County Health Department for three years. I have been out in full time private practice now for about six, six and a half years. I continue to teach on a limited basis.
[S/F 2792] My license to practice medicine is on file here in Dallas County. I'm certified by the American Board of Neurology and Psychiatry.

Q. Now, Dr. Grigson, will you tell us what medical organizations you are a member of, please, sir?

A. I'm a member of the Dallas County Medical Society, the Texas Medical Association, the American Medical Association, the North Texas Neuropsychiatric Society, the Texas Psychiatric Association, the American Psychiatric Association, the Dallas Southern Clinical Society. I think that's it.

Q. I believe you stated that you are certified in your specialty of psychiatry by the Board of Neurology and Psychiatry?

A. Yes, sir, I am.

Q. Would you tell us what the Board of Neurology and Psychiatry is and what Board certification means?

Q. Each one of your branches in medicine has a specialty branch such as surgery or thoracic surgery, pediatrics — has a specialty board that sets forth requirements in terms of training, experience, that you have to fullfil in order to specialize in that particular area. In the area of psychiatry and neurology, they have a combined board, the American Board of Neurology and Psychiatry and they require that you graduate from an accredited [S/F 2793] medical school that they accept, and that you do one year internship where you have sort of a general type of medicine internship; then spend three years in an approved psychiatric residency training program. Those three years are designated so much in terms of hospitalized patients; so much in terms of outpatients; so much time in psychiatry; so much time in neurology and they also require that you have a certain number of hours, lectures and seminars in say basic psychiatry,

basic neurology, basic clinical psychiatry and basic clinical neurology. Then, after you complete those required three years, they require that you have two years of practical experience.

After you get that, they consider that you are Board qualified. If you go ahead and send your credentials in and your background in terms of experience and training, then they set up a four hour written examination in basic neurology, basic psychiatry, clinical psychiatry, clinical neurology. You pass all four of those, then they give you a six hour examination — oral examination where you actually examine patients and you have anywhere from a minimum of six examiners on up to possibly a hundred. If you pass all six hours in — again, basic neurology and psychiatry and clinical neurology and psychiatry, they certify you or say that [S/F 2794] you have fulfilled the requirements of this particular Board.

Q. All right. Now, Dr. Grigson, have you examined few or many persons who are charged with criminal offense?

A. It's close to about eight thousand. Somewhere between seven and eight thousand.

Q. Somewhere between seven and eight thousand?

A. Yes, sir.

Q. Dr. Grigson, you have been called here to testify regarding Ernest Benjamin Smith. Do you know him?

A. Yes, sir. I have examined Mr. Smith.

Q. Do you see him here in court?

A. Mr. Smith is there at the Counsel table. Whenever I examined him his hair was more up in pigtails, and he had a goatee, but I recognize the mole he has on his right cheek and has sort of — actually, a birthmark on his left cheek, but it looks more like a burn. But that is Mr. Smith there.

Q. Now, at whose request did you examine Ernest Benjamin Smith?

A. Judge R. T. Scales of this Court.

Q. When did you first examine the Defendant Smith? [S/F 2795] A. This was on the 18th of February of this

year.

Q. And where did the examination take place?

A. This was on the Eighth Floor of the Dallas County Jail. It was in the Hospital Division. There's a small room that has a table, two chairs where I examined him.

Q. And what type of an examination did you give Smith?

A. I gave the complete psychiatric evaluation. It's called a mental status examination.

Q. Will you explain to the jury just how that examination was conducted?

A. The mental status examination is equivalent to the physical examination. Most of you are more familiar with a physical examination. Whereas it's divided up into head, ears, eyes, nose, throat, heart, lungs, chest, abdomen, the mental status examination was developed in order to examine an individual primarily in three areas — thinking, feeling and behavior. Now, if a person has a brain tumor, hardening of the arteries, thyroid disease or some type of physical illness that affects thinking, feeling or behavior, it does show up in this type of exam. I divide it into five different parts.

The first is called general appearance and [S/F 2796] behavior. This is the way a person walks into the interview room, the way they sit, attention or lack of attention to personal appearance. If you take the two primary symptoms that one encounters in psychiatry, it's depression and attention and an individual that is highly tense walks a little bit faster, more jerky. There's more body movement while sitting. At the other extreme, a highly depressed person will not pick their feet up off the floor as high. There's more of a shuffling type of gait or walk. The shoulders are usually slumped forward, maybe stooped somewhat, and of course either of these extremes affects the individual's attention or lack of attention to personal appearance.

The second part of the examination is called a production of thought. This is really the more difficult part of the examination to teach or understand. Ordinarily, whenever you're listening to an individual, you're listen-

ing to what is called thought content. It has to do with the meaning the individual is trying to communicate to you. But, this part that is called production of thought has to do with the way in which your thoughts come out and how they are related one to another. You consider it normal if your thoughts come out just a logical, rational sequence meaning that they simply make sense. An individual that [S/F 2797] has schizophrenia, their thoughts come out a certain way. As we all get older, we tend to ramble. It takes us longer to make our point. This is called circumstantial thinking.

The third part of the examination is called affect or mood. This is simply a reflection of the individual's emotional state, their feeling state. If a person is talking about something sad, then you expect to see sad facial expressions — their tone of voice, gestures. On the other hand, if they're speaking of something pleasant, you expect to hear this in the tone of voice and see it in their face and body movements so to speak.

The fourth part of the examination is called content of thought. It is during this part of the examination that you get historical information. Birth, early development, educational history, occupational history or service history, marital history, family history, and of particular importance in an individual charged with a crime is their ability to discuss with you those charges or what they were doing on or around or about the time that the alleged offense took place, assuming that if they are able to give you this information, then they are going to be able to go ahead and help their attorney in terms of preparing a defense. Also of importance [S/F 2798] is the presence or absence of delusions or hallucinations — some type of misinterpretation of reality. Hallucinations is where an individual say will see something that is not there or they will hear something that is not there. That is called an auditory hallucination or have an olfactory hallucination where they smell something that is not there.

The fifth part is called the sensorium. This is what most lay people think of as the psychiatric or psycho-

logical examination and yet it makes up a small part of the total exam. It has to do with is the individual oriented to time, place and person. All that means is: Do they know who they are, where they are and what's going on about them. It has to do with recent and remote memory, their intellectual functioning, attention span and concentration ability. But, it is really with these five different parts put together that you should be able to determine how an individual is functioning from an emotional and mental standpoint.

Q. Will you explain to the jury what your findings were with result to Smith?

A. Yes, sir. Mr. Smith was a — is a 26 year old colored male at the time I examined him. His hair is up in pigtails over his head. He does have a mole on his right cheek and sort of a slight discoloration [S/F 2799] on his left side of his face. He has a tattoo on his left — small tattoo, I think, on his left hand. His behavior was completely normal. I saw nothing abnormal or unusual in the way in which he walked, and his body movements while sitting. He had given attention to his personal appearance. I found nothing abnormal or unusual there.

With regard to his production of thought, his thoughts came out in a rational, logical sequence. It was perfectly normal. I could find nothing unusual or abnormal there.

With regard to his emotional state, for the most part throughout the examination he was very pleasant, very co-operative, very polite. The one significant fact which was present was I could find absolutely no signs of any remorse or any type of guilt feelings. I thought this was very important in the situation that existed.

Again, I could find no remorse feelings, no guilt feelings.

With regard to his content of thought, he was able to give me historical information with regard to birth, educational history, service history, occupational history, marital, family — he was able to discuss with me the charges against him. I could find [S/F 2800] absolutely no evidence of any types of delusions or hallucinations.

With regard to his sensorium, he was oriented. He knew who he was, where he was. He knew what was going on around him. His recent and remote memory were intact. They were very good. He's certainly at least average intelligence. His attention span and concentration ability were okay.

Q. Dr. Grigson, does Smith have any mental or thinking disorder?

A. No, sir, he doesn't.

Q. May we assume, then, that at least in your opinion he is neither medically or legally insane?

A. Well, he is certainly not medically insane and from the legal questions, he is aware of the difference between right and wrong, and he certainly is capable of aiding his attorney in his defense.

Q. All right. Now, Dr. Grigson, I believe you stated that Smith's memory was intact as regards past events?

A. Yes, sir, it is.

Q. And was he able to discuss with you the circumstances that led to his present difficulties?

A. Yes, he certainly was.

Q. All right. Now, Dr. Grigson, what is your [S/F 2801] diagnosis of Ernest Benjamin Smith?

A. Mr. Smith has what is called a sociopathic personality disorder.

Q. And what is that, please, sir?

A. This is really just a descriptive term that describes certain personality traits or characteristics. It is not an illness or a sickness. It's simply a descriptive term that does describe an individual that has certain characteristics.

Q. What is a sociopath?

A. Primarily they are individuals that do not have a conscience that most of us develop at an early age. They have no type — say guilt feelings, remorse feelings. When they, say, do wrong, they are very much aware of the difference between right and wrong, but it may be breaking mother's rules, or it may be breaking church rules or legal rules. There are varying degrees of this. But also they have a tendency to be able to manipulate

people. Since they don't operate on the same type value system with regard to, say, a conscience, they are able to very freely manipulate people without, say, considering, "Well, I really shouldn't do that." It's I can do that and get away with it." They derive a certain amount of satisfaction —

Q. Are they truth tellers?

[S/F 2802] A. Oh, no sir. Only if it serves their purpose. They will tell the truth if it serves their purpose. If it's harmful, whatever distortion of the truth is necessary is what they they will use.

Q. Dr. Grigson, are all sociopaths the same or are there degrees of perhaps a scale of sociopathy?

A. It's like high blood pressure. You can have a little bit of high blood pressure or have serious high blood pressure, and the same is true with an individual that is a sociopath. You can have a very mild degree or you can have a very marked severe degree.

Q. Would you tell us where Ernest Benjamin Smith would fit on that scale?

A. Well, he would have to be way down to the very severe end — at the very end.

Q. You're saying he is a very severe sociopath?

A. Yes, sir, I am.

Q. No conscience, no remorse, no guilt feelings?

A. No. He has none.

Q. Now, Dr. Grigson, what is your prognosis in this case?

A. Oh, he will continue his previous behavior — that which he has done in the past. He will again do it in the future.

Q. All right. So, were he released into society, [S/F 2803] I take it, then, you would not expect his behavior to differ from what it has been?

A. No. If anything it would only get worse.

Q. Now, Dr. Grigson, this sociopathic personality that Smith has — is this a condition that will improve with time? I guess — what I'm asking you is this: Is this a stage that he is passing through that he will grow out of?

A. No. This is not what you would consider a stage. This is a way of life. Just as you work every day, well his personality comes out in his behavior, but it is not a stage he is going through. It's only something he will continue.

Q. You said get worse?

A. Yes.

Q. If it can?

A. Right.

Q. Dr. Grigson, I will ask you if Ernest Benjamin Smith has any regard for the lives and property of other persons, be they inmates, guards, visitors or just citizens?

MR. WILSON: We object to the form of the question. He can ask for the man's opinion.

Q. (By Mr. Mulder) Do you have an opinion as to whether or not he has any regard for the lives of [S/F 2804] property, of other persons, be they prisoners, guards, visitors or just citizens?

A. Yes, sir, I have an opinion as to that.

Q. And what is that opinion?

A. Well, it's my opinion that really, Mr. Smith does not have any regard for another human being's property or for their life, regardless of who it may be. This is what makes him such a very severe sociopath. He has complete disregard for another human being's life.

Q. Dr. Grigson, does the field of medicine — perhaps psychiatric treatment and/or hospitalization of some sort — does that have anything beneficial to offer someone like Ernest Benjamin Smith?

A. We don't have anything in medicine or psychiatry that in any way at all modifies or changes this behavior. We don't have it. There is no treatment, no medicine. Nothing that's going to change this behavior.

Q. Now, Dr. Grigson, do you have an opinion as to whether or not there is a probability that the Defendant, Ernest Benjamin Smith, will commit criminal acts of violence that will constitute a continuing threat to society?

A. Yes, sir. I have an opinion as to that.

Q. And what is that opinion?

A. That certainly Mr. Smith is going to go [S/F 2805] ahead and commit other similar or same criminal acts if given the opportunity to do so.

Q. Now, Dr. Grigson, I believe you have stated that this man has no remorse or sorrow for what he has done?

A. No. He has none.

Q. Now, let me ask you one last thing. Does this man — can you tell from your examination whether he has — I guess a dominant personality or a leader type individual or is he a follower?

A. No. He is very much a leader. Due to his intelligence and his manipulating ability, he is very much a leader.

Q. He is not the type to just go along with somebody else just because it seems like the thing to do?

A. Certainly not. He would lead his way and go his way. He is not what you would consider a follower.

MR. MULDER: We will pass the witness for Cross Examination.

CROSS EXAMINATION

BY MR. SIMMONS:

Q. Dr. Grigson, you're kind of the hatchet man down here for the District Attorney's Office, aren't you?

MR. MULDER: We object to that.

THE COURT: Sustained.

[S/F 2806] Q. (By Mr. Simmons) Isn't it a fact that when they want to try to send somebody to the electric chair or give them severe punishment, they bring you in to testify about the Defendant?

A. They use requests that I receive on cases such as this or where they want to send somebody to Rusk State Hospital — used in all sorts of cases. Yes, sir.

Q. How many times would you say that you have been down here to the Dallas County Courthouse and testified in a criminal case?

A. Oh, I don't know. I would say — I don't have any — several hundred times, I'm sure.

Q. During that seven hundred times —

A. Several hundred.

Q. Several hundred. I thought that was what you said. During the several hundred times that you have been down here to testify, have you always testified for the District Attorney's Office?

A. No, sir, I have not.

Q. On how many occasions do you think that you have ever testified for anybody other than the District Attorney's Office?

A. Well, I never testify for anybody. I only testify as to what my findings are. Usually, if the [S/F 2807] Defense Attorney likes what I have found, they call me. If the District Attorney's Office — well, usually they call me whether they like it or dislike it. I never testify for anybody.

Q. Did you ever furnish the Defense Attorneys in this case a copy of your findings?

A. I was told that they were certainly going to be made available to you — that you would be given those. That was my misunderstanding.

Q. Do you know what causes a person to be a sociopath?

A. No, sir. We have no idea. There's been a lot of research done and a lot of money spent, but we still don't know what causes it.

Q. How long a time did you spend with Ernest Benjamin Smith?

A. Oh, I would say — somewhere an hour and a half or thereabouts. I don't exactly recall.

Q. Approximately an hour and a half?

A. Yes, sir.

Q. And you say that after talking to him for an hour and a half, you are convinced that he is a severe sociopath on the far end of the sociopathic scale?

A. Yes, sir. Absolutely.

Q. What would you say was the most important [S/F 2808] thing that he said or did or the most important response that you got that caused you to think that he is a severe sociopath down on the far end of the sociopathic scale?

A. He told me that this man named Moon looked as though he was going to reach for a gun, and he pointed his gun toward Mr. Moon's head, pulled the trigger, and it clicked — misfired, at which time he hollered at Howie, apparently his other partner there who had a gun, "Watch out, Howie. He's got a gun." Or something of that sort. At which point he told me — now, I don't know who shot this man, but he told me that Howie shot him, but then he walked around over this man who had been shot — didn't look to see if he had a pistol in his belt or in his coat.

Q. Let me interrupt you.

MR. MULDER: No. No.

THE COURT: Finish your answer.

THE WITNESS: Didn't check to see if he had a gun nor did he check to see if the man was alive or dead. Didn't call an ambulance, but simply found the gun further up underneath the counter and took the gun and the money. This is a very — sort of cold-blooded disregard for another human being's life. I think that his telling me this story and not saying, you know, "Man, I would do [S/F 2809] anything to have that man back alive. I wish I hadn't just stepped over the body." Or you know, "I wish I had checked to see if he was all right" would indicate a concern, guilt or remorse. But I didn't get any of this.

Q. (By Mr. Simmons) All right. You're saying, then, that because he didn't show any remorse to you, because of Mr. Moon's death, that's what led you to believe he was a severe sociopath?

A. No. This was just part of it in terms of the attitude. I mean, again, it was not just this. But, some of his other behavior, but certainly this thing stood out so clearly.

Q. Would you say, being a psychiatrist, that a person could have been frightened or in a daze or state of shock, and that would have caused him to act in such a way as Ernest Benjamin Smith did?

A. Well, certainly. Yeah. I think if I had shot somebody I would certainly be in a daze or state of shock.

But, you know, I think that if I were in that sort of situation I would probably be frightened and run like the devil. I wouldn't step over the body to get the money. I would want to get out of there. But an individual that is involved in, say, a goal directed fashion certainly is not functioning in a daze or shock [S/F 2810] type state.

Q. Are you saying, Doctor, that he was pleasant with you during your interview?

A. Yes. He certainly was. He was very pleasant.

Q. Was he co-operative?

A. Very co-operative.

Q. Was he polite?

A. He was extremely polite.

Q. Are you saying that a person who is truthful — that would not be a symptom of being a sociopath?

A. You see, I don't know how truthful he was with me, sir. I don't know who shot this man and from a medical standpoint in terms of any examination, it's not so important. I think that he certainly was truthful at times. As to exactly when, I don't know.

Q. Was there any discussion of having pulled the trigger as a reflex action — as the gun was jerked in another direction?

A. No. He told me that he jerked it toward Moon's head as a reflex action — that he thought the man was going for the gun or for a gun and pulled it. Again, I don't know that this is the truth or not.

Q. Right. I understand that you're just going by what he told you.

A. Yes, sir.

[S/F 2811] Q. Did he ever tell you that he had a pistol with him that he knew would not fire?

A. No, sir. He told me that he didn't have a shell in the chamber, which was the reason that it misfired. Again, I don't know that is true.

Q. Did he tell you that that particular gun would not put a shell in the chamber?

A. No, he didn't.

Q. He didn't tell you that?

A. No, sir.

Q. You spent an hour and a half with Ernest Benjamin Smith?

A. Yes, sir.

Q. When do you think that a person begins to manifest any signs of sociopathic personality?

A. It varies. Some begin to show some of the early symptoms say 4 or 5 years old. Others, it may not show up until they are 30. It does vary considerably.

Q. Isn't it the usual case, Doctor, that if a person is a sociopath and more especially a severe sociopath at the end of the scale as you have described to Mr. Mulder about Ernest Smith — isn't it a fact that it is more likely than not that this kind of conduct and traits will come out in him at an early [S/F 2812] age?

A. Usually you see it in their — say their early teenage years.

Q. If a person were a sociopath, wouldn't it be unusual for him to manifest that characteristic at age 26 if he had not manifested it earlier than that?

A. No. This is — many times these individuals — again, the more intelligent they are, the more they usually are not so obvious. They don't get caught. What I'm trying to say is that usually they are manifesting it, but if they're really smart, again, they don't get caught. Again, sometimes you don't really see the overt manifestations until they are 30 years of age. Usually it is earlier, though.

Q. Would you say that a person that had been considered to have been a dependable during his lifetime or teenagehood or young adulthood — that would indicate that he is not a sociopath?

A. No. You find many sociopaths that are dependable as long as they are getting what they want. In other words, as long as they are, you know, getting their needs met, then they certainly, you know —

Q. In other words, you're saying somebody that is fooling people —

[S/F 2813] A. No, sir. I didn't mean to say that. They are capable of fooling people, but I just meant that as long as they're being taken care of, then — you know,

you may not see overt behavior. Usually you do.

Q. If you had a man that was considered to be a truthful person throughout his lifetime, would you way that person is a sociopath?

A. Well, not just that one characteristic certainly wouldn't make him a sociopath.

Q. Would the reverse be true — a person who is a truthful person, has a reputation as being a truthful person would not be a sociopath regardless of his other characteristics?

A. No. That is not necessarily true, because again you may not know a sociopath is not a truthful person. But if — you know, if a person is absolutely truthful, then you know — you don't suspect him to be a sociopath.

Q. Have you ever, during your experience of talking to people charged with crimes as you have described to this jury — have you ever met and talked to as nice a young man as the man at the end of the Counsel table?

A. Yes, sir, I have. Several occasions. Bobby Joe Daniels was very pleasant and co-operative [S/F 2814] under similar type circumstances.

Q. All right. Are you saying, then, that he is more pleasant and a nicer person than most of them?

A. No, sir, I'm not saying that. I'm just saying that he is a pleasant or was, certainly — during — throughout the examination that I did. He was very pleasant.

Q. And co-operative with you?

A. Co-operative.

Q. He didn't try to lead you to believe that he was insane or crazy or anything like that, did he?

A. No. He certainly didn't do anything like that.

Q. Did he talk to you in an intelligent, rational manner?

A. He certainly did.

Q. You have earlier said that he was polite, co-operative, pleasant.

A. Right. He certainly was.

Q. Have you ever talked to Ernest Benjamin Smith's stepmother?

A. No, sir, I haven't.

Q. Have you ever talked to any of his relatives about him?

[S/F 2815] A. No, sir, I haven't.

Q. Have you ever talked to any of his friends about him?

A. I did examine Mr. Robinson.

Q. You're talking about the other man involved in this situation?

A. Yes, sir.

Q. Did you ever do any other investigation with regard to Ernest Benjamin Smith other than talk to him for an hour and a half?

A. No. That was primarily — it was primarily based on that examination — what I found.

Q. Based on your discussion with him?

A. Yes.

Q. For an hour and a half, at which time he was pleasant, co-operative, polite and so forth — the other things you have discussed here?

A. Yes, sir.

Q. Or described?

A. Uh-huh.

Q. He talked to you intelligently. He was rational. He didn't try to fool you into thinking he was crazy or anything, did he?

A. No. I think he was trying to fool me, but not into thinking he was crazy.

[S/F 2816] Q. Fool you in the manner that you have already described to the jury, is that correct?

A. Well, with regard to who shot who or what happened.

Q. Are you saying that you don't believe what he said about who shot who?

A. No. I'm saying that I don't know. I don't know.

Q. Never talked to anybody about him other than —

A. No, sir.

Q. Anybody that knew him or was acquainted with him before this trouble or anything?

A. Just — again, to Howie Ray Robinson.

Q. You say his behavior was normal?

A. Yes, sir, it was.

Q. Nothing abnormal about his behavior?

A. No.

Q. Intelligent talking

A. Right. Certainly was.

Q. Polite?

A. Yes, sir.

Q. Courteous?

A. Yes, sir.

Q. Pleasant?

[S/F 2817] A. Yes,sir.

Q. You talked to him for an hour and a half. Never talked to anybody else about him — no relative, anybody else?

A. Yes, sir. I talked to Mr. Robinson.

Q. You're talking about the friend or the other person?

A. Yes, sir.

Q. And you say now that he is a severe sociopath down at the end of the sociopathic level?

A. Yes, sir, I do.

Q. And the reason you do that is that you feel he should have shown remorse about Mr. Moon?

A. Oh, absolutely. Certainly, sir. Should have had some guilt-type feelings — remorse.

Q. Would it make any difference in your evaluation of Ernest Benjamin Smith if you thought or believed that he felt that he was not responsible for Mr. Moon's death? Would that make any difference with regard to his remorse?

A. But, you know, he was. He at least stated he picked out the store. You know, he chose it. He was in there, so he was responsible. So, I feel like that — you know, certainly he should feel remorse.

Q. You feel that because he was there that he [S/F 2818] would be responsible for it, and he should feel remorse?

A. Well, yes, sir. I think any normal person with a conscience would feel, you know, concern or you know, say, "Golly, you know, I didn't mean to kill the man."

Or — you know, would be concerned.

Q. If he didn't kill the man, he wouldn't have any statement to make like "I didn't mean to kill the man," would he?

A. No, but he would say, "Gosh, I wish that wouldn't have happened while we were doing this. All we wanted to do was rob the store." But, I didn't hear anything like that.

Q. But you did hear a young man that was pleasant, co-operative, polite and these other things?

A. Yes, sir, I did.

MR. SIMMONS: That's all the questions we have.

REDIRECT EXAMINATION

BY MR. MULDER:

Q. Dr. Grigson, he told you that he — when he saw Mr. Moon make a move that he hadn't told him to make, that he came up with his gun and tried to shoot him?

A. Yes.

Q. And his gun misfired, because he failed to put a bullet in the chamber?

[S/F 2819] A. He didn't tell me he failed to put a bullet in the chamber. He told me he pointed the gun at Mr. Moon, tried to fire, and that it misfired. He said there wasn't a bullet or shell in the chamber.

Q. All right. Now, Dr. Grigson, over the years you have testified many times, have you not?

A. Well, on occasion, yes, sir.

Q. You have been called to testify by both Judges, Prosecutors and Defense Lawyers, have you not?

A. Yes, sir, I have.

Q. Testified in State and Federal Court — Dallas County, all over the State, as far as that is concerned?

A. Yes, sir, I have.

Q. As a matter of fact, you have testified for Howard Wilson, have you not?

A. Yes, sir. I never testify for anybody, Mr. Mulder.

Q. You have been called by him?

A. Yes, sir. I'm sure I have. I don't specifically recall, but I'm sure I have.

MR. MULDER: I believe that's all we have.

RECROSS EXAMINATION

BY MR. SIMMONS:

[S/F 2820] Q. Did you ever meet a person you didn't think was a sociopath?

A. Yes, sir.

Q. You won't have to name him. That's all right.

MR. MULDER: No. Go ahead.

THE COURT: Had you finished your answer?

THE WITNESS: No, sir, I hadn't, Your Honor. No. Only a relatively small per cent of the individuals that I examine charged with a crime are sociopaths. About fifteen per cent of them are suffering from emotional illness. About maybe fifteen per cent of them are faking. But it's not a large number of them that are actually sociopaths, but a certain per cent.

Q. (By Mr. Simmons) Am I correct in saying, from what you have told Mr. Mulder and told the jury, that one of the keys, so far as you are concerned, is the situation of remorse?

A. No. It's the lack of guilt and their ability to manipulate. There are other factors, but these two are outstanding.

MR. SIMMONS: That's all we have.

MR. MULDER: That's all we have.

THE COURT: Thank you.

[S/F 2821] Your next witness, please.

MR. MULDER: Your Honor, and ladies and gentlemen of the jury, the State will rest on the issue of punishment.

MR. SIMMONS: We will rest on punishment.

MR. MULDER: We close.

MR. SIMMONS: Close.

THE COURT: Close the testimony. Excuse the witnesses.

(Whereupon the Charge of the Court on the issue of punishment was read to the jury, after which the following proceedings were had in the presence and hearing of the jury:)

* * *

End of Statement of Facts

COURT OF CRIMINAL APPEALS OF TEXAS

Ernest Benjamin SMITH, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 49809.

Feb. 18, 1976.

On Appellant's Motion for Rehearing
July 14, 1976.

Defendant was convicted before the 195th Judicial District Court, Dallas County, R. T. Scales, J., of murder, committed during course of robbery, and he appealed. The Court of Criminal Appeals, Morrison, J., held, inter alia, that defendant could be convicted of murder despite fact that it was defendant's codefendant who killed deceased, that evidence supported finding that defendant would always constitute continuing threat to society, that indictment was not fatally defective, that death penalty statute was not unconstitutional, that oath required of jurors in capital case was not unrealistic repressive oath and did not limit inquiry into their qualifications, that proof of possession of pistol by defendant prior to robbery might be justified as in rebuttal to testimony that defendant did not own pistol, but testimony as to subsequent possession should not have been admitted, that such error did not constitute reversible error however, and that trial court did not err in submitting murder with malice in charge to jury at guilt-innocence phase of trial.

Affirmed.

John F. Simmons, Dallas, for appellant.

Henry Wade, Dist. Atty., James B. Scott, Douglas D. Mulder, Stephen P. Tokoly and Winfield W. Scott, Asst. Dist. Attys., Dallas, Jim D. Vollers, State's Atty., and David S. McAngus, Asst. State's Atty., Austin, for the State.

OPINION

MORRISON, Judge.

The offense is murder; the punishment, under Article 1257, V.A.P.C. and Article 37.071, V.A.C.C.P., death.[1]

The record reflects that grocery store operator William Moon was killed during the commission of a robbery at his market.

By ground of error one appellant contends that the evidence is insufficient to support the conviction, since it was the appellant's co-defendant who killed the deceased during the robbery. Such a contention completely ignores the law of principals, and is without merit. *Thompson v. State*, Tex.Cr.App., 514 S.W.2d 275; *Leviness v. State*, 157 Tex.Cr.R. 160, 247 S.W.2d 115.

Appellant's next contention relates to the punishment hearing. Appellant claims that the evidence is insufficient to support the jury's answer of "yes" to Special Issue No. 2[2] of Article 37.071, supra.

This appellant testified that he had been unable to obtain a regular job since his conviction for possession of marihuana in 1970, and that he was unemployed on the night of the homicide when he met George Holden and Howie Ray Robinson at the Pussy Cat Lounge. He stated that Holden asked if he wanted to make some money and that from his prior knowledge of Holden that he was not a "working individual",he knew that whatever Holden proposed would not be legal. Appellant testified that after he agreed to go with them he went to his home, changed clothes and got a pistol. He also stated he knew Holden had a pistol, which he gave to Robinson. They then went to the grocery store, where appellant

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[1] This offense was alleged to have been committed on 29th day of September 1973. This was during that period of time when Article 1257 was in operation and before Sec. 19.03 became effective.

[2] Article 37.071(b)(2) states:

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

and Robinson entered and Holden remained in the automobile. When appellant and Robinson found customers in the store; they left and did not re-enter until after the customers had left. At this point, appellant pointed the pistol at the attendant and told him, "This is a hold-up." When the attendant made a motion "behind his jacket", appellant called to Robinson, who shot and killed the attendant. We pause here to observe that it was this appellant who first pointed his weapon at deceased and attempted to shoot him. It was only after the appellant's gun misfired that he called to his co-principal to complete the killing which he had attempted.[3] Following this, all the money, including the change, and a pistol kept by the attendant were taken, and the parties repaired to the house of a friend, where the fruits of the robbery were divided and the parties separated. Appellant spent the night in a house nearby.

Appellant's oral confession was also admitted into evidence.

Dr. James P. Grigson, a practicing psychiatrist appointed by the court to examine appellant, testified that his examination had led him to conclude that the appellant, though medically and legally sane, felt no remorse or sense of guilt as the result of his participation in this robbery-murder. Grigson also expressed the opinion that appellant's conduct in the future would not change. He further stated that his branch of medical science had found no cure for persons who were suffering from the type of personality disorder demonstrated by appellant.

Though not a serious one, this appellant had a criminal record. Of extreme importance is his apparent surrender to misfortune following his marihuana conviction. He made no effort to rehabilitate himself, and no serious effort to secure steady employment. There was no evidence that appellant was in any way under the

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[3] At the trial, appellant testified he shouted, "Look out, Howie", as the deceased made the motion. However, in appellant's oral confession, which was admitted into evidence, appellant stated that he said, "Get him", to Robinson after his own gun misfired.

domination of anyone, nor was he under any mental or emotional pressure. He simply went out to rob and was the first person who tried to kill his victim (according to his oral confession). After the killing, he testified, he paused long enough to secure a pistol from under the counter and when a cigar box containing coins spilled, he paused to recoup the coins. His entire conduct was calculated and remorseless, and the jury was justified in finding that this appellant will always constitute a continuing threat to society.[4]

Appellant's third ground of error also relates to the punishment hearing. Appellant first charges that the court erred in failing to submit his requested charges five and seven, which were intended as substitutes for Special Issues one and three of Article 37.071(b), supra, and second he claims that the evidence is insufficient to support the jury's finding of "yes" to Special Issues Nos. 1 and 3. This is clearly a multifarious ground of error and presents nothing for review.

However, we will briefly discuss the contention. In substance, appellant contends, without citation of authority, that Special Issues 1 and 3 are not applicable to one charged as a principal.[5] To agree with such contention would require that we ignore this Court's interpretation of the law of principals. Earlier in the opinion

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[4] Appellant has attached to his brief what he denominates as a "Supplemental Transcript". This "transcript" contains the testimony of one of the State's witnesses at another and later trial, which appellant claims is materially different from that testimony given at his trial. The "transcript" is not properly a part of this record on appeal and cannot be considered by this Court. *Booth v. State*, Tex.Cr.App., 499 S.W.2d 129.

[5] Article 37.071(b)(1) and (3), supra, state:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

we declined to do so. Further, regarding the sufficiency of the evidence, the facts set forth under ground of error two are sufficient to support the jury's affirmative responses to Special Issues Nos. 1 and 3.

By ground of error four, appellant claims that the indictment is fatally defective because it fails to set out the elements of robbery in his indictment charging him with murder during the commission or attempted commission of robbery. Appellant contends that the indictment should allege the elements of robbery as well as murder.

Appellant's contention was answered adversely to him in *Jones v. State*, 53 Tex.Cr.R. 131, 110 S.W. 741, and *Oates v. State*, 48 Tex.Cr.R. 131, 86 S.W. 769, which hold that an indictment need not allege the constituent elements of a felony which the defendant was committing or attempting to commit at the time of the homicide charged in the indictment. See also *Gonzales v. State*, Tex.Cr.App., 517 S.W.2d 785; *Watts v. State*, Tex.Cr.App., 516 S.W.2d 414; *Earl v. State*, Tex.Cr.App., 514 S.W.2d 273, which hold that under the new code an indictment charging one offense during the commission of another crime need not allege the elements of the latter offense.

In grounds of error five and six, appellant attacks the constitutionality of Article 1257, supra, Sec. 19.03, V.T.C.A., Penal Code, and Article 37.071, supra. His contentions have been answered adversely to him in our recent opinion in *Jurek v. State*, Tex.Cr.App., 522 S.W.2d 934.

Appellant also contends that the caption of the death penalty statute under which he was tried, Article 1257, supra, fails to meet the requirements of Article III, Sec. 35, of the Texas Constitution in that it "embraces more than one subject, and is therefore insufficient to apprise the Legislature and the public of the full effect of the amendment."

Appellant's brief contains no citation of authority, and no discussion of his contention. Without further elaboration from him, we are unable to meet appellant's

contention other than to observe that the caption covers the one subject legislated upon by the Act.

Appellant's seventh and ninth grounds of error will be discussed together. In the seventh ground of error appellant asserts that Article 1257(d), V.A.C.P., imposes "an unrealistic, repressive oath on prospective jurors and limits inquiry into their qualifications" required by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. As we construe this statute it neither imposes a repressive oath on prospective jurors nor prohibits the inquiry which appellant claims he was denied. However, the appellant does not call to our attention any portion of the record where he was denied an opportunity to make such inquiry.

Appellant seems to be laboring under the impression that Article 1257(d), supra, in itself constitutes an oath to be administered in its own terms to each venireperson. Our interpretation of this statute is that it merely provides one criteria by which each venireperson is to be qualified. This is in agreement with that portion of *Witherspoon* set forth at 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776, footnote 21.[6]

In his ninth ground of error appellant says that the trial court "erroneously allowed the exclusion for cause of veniremen who had scruples concerning capital punishment." Upon rebriefing on orders of this Court, appellant now points out certain named members of the venire who he claims were inadequately examined and

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[6] "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the *sentence*, in this or any other case."

excused because of their views as to the death penalty. We have now examined the voir dire to which appellant points and find that they were tested in accordance with the terms of Article 1257(d), supra, and were additionally questioned so as to substantially comply with the mandate of footnote 21 of *Witherspoon*.[7] This venire qualification can be distinguished from *Hovila v. State*, Tex.Cr.App., 532 S.W.2d 292 (Decided April 30, 1975), where the voir dire complied neither with *Witherspoon* nor with the mandate of Article 1257(d), supra. The questions propounded by the court to each jury panel were leveled solely as to the answers to the issues set forth in Article 37.071(d), supra, and not to the ability of the venirepersons to pass upon the guilt or innocence of the accused or "any issue of fact."

Ground of error eight charges the State used its peremptory challenges to strike four members of the venire who were black, thereby excluding members from the jury who were the same race as appellant.

Appellant's contention was answered adversely to him in *Hill v. State*, Tex.Cr.App., 487 S.W.2d 64, in which we adhered, as we do here, to our earlier holding in *Ridley v. State*, Tex.Cr.App., 475 S.W.2d 769, wherein we stated:

"We hold that no systematic exclusion has been shown. To hold otherwise would in effect be abolishing our peremptory challenge practice which has always been a part of our system to help an accused as well as

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[7] With the exception of venirepersons Baker and Switch, all those mentioned in appellant's brief were tested, as we construe their examination, in accordance with the terms of Article 1257(d), supra.

Baker, a "gospel minister," in the course of his examination, stated:

"Q. Are you saying your religion would prevent you from personally being on a death penalty case?

A. Yeah."

Switch, an employee of a hospital, answered, "Death is something that I would not be able to condemn anybody to." He stated that this was because of his profession.

the State obtain an impartial jury and a fair trial."

See also *Brown v. State*, Tex.Cr.App., 476 S.W.2d 699; *Hardin v. State*, 475 S.W.2d 255. Cf. *Jaquez v. State*, Tex.Cr.App., 473 S.W.2d 530. See also *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.

Grounds 10 and 11 relate to the admission at the guilt-innocence stage of the trial of evidence of extraneous offenses both prior and subsequent to the date charged in the indictment. Both consisted of proof that appellant possessed a pistol in a public place and nothing more. Proof of the possession of a pistol by appellant prior to the robbery might be justified as in rebuttal to his testimony that he "didn't own a pistol", but the testimony as to the subsequent possession should not have been admitted.

It is this continued persistence in making borderline error that causes certain counties in this State to have a much worse reversible error record than others. But regardless of this, we must determine if this proof, in the light of the case as a whole, constitutes reversible error.

The proof is clear, and appellant fully admits in his testimony that he went armed into a convenience store with his companion, who was also armed, and that in the course of the ensuing robbery, the store attendant was shot and killed.

We conclude as we did in *Mabry v. State*, Tex.Cr.App., 492 S.W.2d 951, that the evidence of appellant's possession of a pistol without more was not of sufficient gravity to have influenced a jury who had heard the testimony of this brutal robbery-murder. See also *McNeal v. State*, Tex.Cr.App., 499 S.W.2d 173, and 13B Tex.Dig., Criminal Law § 1169(11).

Appellant next contends that the trial court erred in submitting murder with malice in his charge to the jury at the guilt-innocence phase of the trial. Citing *Brazile v. State*, Tex.Cr.App., 497 S.W.2d 302, appellant claims the type of murder, whether during the commission of a robbery or with malice, relates only to the question of punishment, and was therefore erroneously submitted to the jury at the trial on the merits. No error is shown. *Lee*

v. State, Tex.Cr.App., 503 S.W.2d 244; *Caraway v. State*, Tex.Cr.App., 489 S.W.2d 106.

In a capital case, it was incumbent upon the court to submit the issue of murder with malice in his charge on the guilt-innocence phase of the trial in order to avoid a trifurcated trial. Any other submission would have required a finding of guilt as to murder at the guilt-innocence stage of the trial, a finding of guilt of murder with malice at a second stage of the trial, and a finding that the offense was committed under the circumstances outlined in Article 37.071, supra, at a third stage of the trial. This was not contemplated by the Legislature.

Appellant's last ground of error relates to seven separate instances in which the trial court overruled appellant's motion for mistrial following certain questions and remarks made during the trial. Appellant contends that the net cumulative effect of these incidences, viewed in light of the severity of the punishment, requires reversal.

The seven incidences were:

1. It is appellant's contention, if we understand the same, that the witness Mitchell was guilty of perjury. We are not told exactly where the alleged perjury occurred, in what respect such testimony was false, or how it was called to the trial court's attention. We are at a loss to answer this assertion. This contention does not meet the requirements of Article 40.09, Sec. 9, V.A.C.C.P., and presents nothing for review. *Hurd v. State*, Tex.Cr.App., 513 S.W.2d 936; *Peterson v. State*, Tex.Cr.App., 508 S.W.2d 844.

2. Appellant asserts that the court erred in permitting Dr. Grigson, a psychiatrist, to testify when his name had not been listed in compliance with appellant's motion in limine to list all of the State's witnesses *to be used in its case in chief.* We have concluded that since Dr. Grigson was called in rebuttal, he did not come within the purview of appellant's motion. Since Dr. Grigson had examined appellant prior to trial, his appearance as a witness in rebuttal did not surprise appellant.

3. The appellant further asserts that the prosecution violated the court's order on his motion in limine referring to the appellant as "Dirty Red." The record reflects at the point indicated by the appellant's brief that the witness' answer which contained the name was unresponsive and upon objection the same was sustained and the court on its own motion instructed the jury to disregard the answer. A prompt instruction to disregard is usually sufficient to cure error. No reversible error is reflected. *Pearson v. State*, Tex.Cr.App., 500 S.W.2d 829; *Terry v. State*, Tex.Cr.App., 481 S.W.2d 870.

4. Appellant asserts that the prosecutor referred to an extraneous offense when he propounded to the appellant the question: "You've had plenty of experience with lawyers, haven't you?" The objection "as being an improper remark" was sustained and the jury was instructed not to consider the question. The record reflects that the prosecutor's question came just after the appellant testified that he had pled guilty to the charge of possession of marihuana upon the advice of his counsel. In view of the prompt action of the court, no error is shown. See *Pearson v. State*, supra.

5. Appellant next complains of the State's admonition, "Don't answer until your lawyer has an opportunity to object." The objection was that the remark was improper, which the court sustained by stating, "No comment, please", and then instructed the jury not to consider the statement. No error is shown.

6. Appellant complains of a question by the State but does not cite the portion of the record where it was asked. Nothing is presented for review. *Peterson v. State*, supra.

7. The last contention is that error is reflected by a question propounded to the appellant regarding the gun he had in his possession at the time the offense occurred. The question was, "If it was somebody else's, you know, you would have stolen it." The objection to the question was sustained and the jury was instructed not to consider the same. *Rodgers v. State*, Tex.Cr.App., 486 S.W.2d 794.

We overrule appellant's contention that the cumulative effect of the occurrences constituted reversible error.

Finding no reversible error, the judgment is affirmed.

OPINION ON APPELLANT'S MOTION FOR REHEARING

ODOM, Judge.

The opinion concurring in part and dissenting in part on original submission, by the writer, is withdrawn.

The questions that concerned the writer regarding the constitutionality of Art. 37.071(b)(2), V.A.C.C.P., have been laid to rest by the Supreme Court of the United States in *Jurek v. Texas*, ____ U.S. ____, 96 S.Ct. 2950, 49 L.Ed.2d 929, 19 Cr.L. 3282. See also *Gregg v. Georgia*, ____ U.S. ____, 96 S.Ct. 2909, 49 L.Ed.2d 859, 19 Cr.L. 3250, and *Proffitt v. Florida*, ____ U.S. ____, 96 S.Ct. 2960, 49 L.Ed.2d 913, 19 Cr.L. 3276.

The motion for rehearing is overruled.

ROBERTS, Judge (concurring).

My dissenting opinion on original submission is withdrawn. The Supreme Court of the United States has resolved the questions I had about the constitutionality of Art. 37.071(b)(2), Vernon's Ann.C.C.P., in *Jurek v. Texas*, ____ U.S. ____, 96 S.Ct. 2950, 48 L.Ed.2d ____, 19 Cr.L. 3282 (1976). See also *Gregg v. Georgia*, ____ U.S. ____, 96 S.Ct. 2950, 48 L.Ed.2d ____, 19 Cr.L. 3250 (1976), and *Proffitt v. Florida*, ____ U.S. ____, 96 S.Ct. 2960, 48 L.Ed.2d ____, 19 Cr.L. 3276 (1976).

I agree that the motion for rehearing should be overruled.

ERNEST BENJAMIN SMITH, Jr., Appellant

NO. 49,809 vs. - - - - Appeal from DALLAS County

THE STATE OF TEXAS, Appellee

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in the affirmance of this case but dissent to the majority's analysis and reasoning in its disposition of appellant's grounds of error numbers two, three, five, six and seven.

I.

In his second ground of error, appellant contends the evidence is insufficient to support the jury's finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." (Art. 37.071(b)(2), V.A.C.C.P.) Although I would hold this issue unconstitutionally vague, as stated in my opinion concurring in part and dissenting in part filed in Jurek v. State, 522 S.W.2d 934, I nevertheless am compelled to question the majority's disposition of this ground of error even within the framework of their own construction of that issue.

In my opinion filed in *Jurek*, supra, I observed:

> "Having mistaken vagueness for discretion, the majority naturally have failed to recognize the vagueness inherent in Art. 37.071(b)(2). The word 'probability' is not examined by the majority. This concept is at the core of the issue submitted under this subsection, yet the majority seek neither to define it nor to discuss its meaning. The essential indefiniteness of the word 'probability' is ignored."

Now the sufficiency of the evidence to support the jury finding that such probability exists has been challenged, and the majority are unable to adequately respond. As sufficient evidence the majority cite the following: (1)

the circumstances of the instant offense; (2) a marihuana conviction followed by no effort to rehabilitate himself or secure employment; (3) the testimony of Dr. Grigson, a psychiatrist, that appellant has a sociopathic personality disorder, for which there is no cure, as a result of which he lacks a sense of guilt and will continue to commit criminal acts of the same nature. The State, in its brief, relies solely upon the psychiatric testimony to support the jury's finding.

Apart from the psychiatrist's testimony, which I will discuss later, the State cites no evidence to support the jury's finding and the majority cite only the facts of the primary offense, a marihuana conviction, and a poor employment record. I fail to see how a five year probated sentence for possession of marihuana has any probative value on the issue of whether one will commit criminal acts of violence that will constitute a continuing threat to society. And if being unemployed has any probative value on that issue, perhaps the Legislature should make it a felony to be unemployed. I also reject the proposition that evidence of the nature and circumstances of the primary offense, *standing alone*, is sufficient evidence to support an affirmative answer to the "probability" special issue. The issue of the sufficiency of the evidence in this case, then, of necessity must turn upon the psychiatric testimony. But it is the psychiatric testimony, its implications and effect, and the majority's reliance on it, which raise my greatest doubts and apprehensions.

A profile of Dr. Grigson's testimony,[1] and its logical

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[1] The psychiatric testimony of Dr. Grigson may be summarized as follows. On direct examination he testified (1) to his credentials as a psychiatrist; (2) to the types of examinations administered by him to appellant; (3) to the results of those examinations; (4) that appellant is medically and legally sane; (5) that appellant has a sociopathic personality disorder; (6) to the characteristics of a sociopath; (7) that there are degrees of sociopathy and appellant is on the very severe end of that scale; (8) that the prognosis is appellant will continue his previous behavior or get worse; (9) that

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structure, may be accurately outlined as follows. A mental status examination was administered to appellant to determine the condition of his thinking, feeling and behavior, which consisted of five parts: (a) general appearance and behavior; (b) production of thought; (c) affect or mood; (d) content of thought; and (e) sensorium. None of the tests revealed anything abnormal or unusual except for one characteristic. From the affect or mood part of the examination, Dr. Grigson could find "absolutely no signs of any remorse or any type of guilt feelings." As a result of this single characteristic discovered in a one and a half hour interview, Dr. Grigson "absolutely" diagnosed appellant as "a very severe sociopath." More than once he testified to the basis for his diagnosis, and never once did he give any basis other than this: that appellant had no sense of guilt or remorse with respect to the commission of the offense for which he was on trial. Having made his diagnosis, he proceeded to testify to the characteristics of the sociopathic personality generally, and that there is no effective treatment for the sociopath. Without referring to any specific findings in the examination, Dr. Grigson testified that appellant

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appellant has no regard for other persons' property or lives; (10) that no treatment to improve his condition exists; (11) that appellant will commit criminal acts of violence that will constitute a continuing threat to society if given the opportunity to do so; (12) that appellant is a leader.

On cross-examination Dr. Grigson testified (1) that it is not known what causes a person to be a sociopath; (2) that, for the basis of his diagnosis, he spent approximately an hour and a half examining appellant but did not interview friends and relatives who knew appellant; (3) that he is certain appellant is a severe sociopath; (4) that his diagnosis of sociopathic personality disorder was based on the failure of appellant to show any guilt feelings or remorse with respect to the commission of the offense for which he was on trial; (5) that during the examination appellant was pleasant, cooperative, polite, intelligent, rational, courteous, and did not try to fake insanity; and (6) that sociopathic symptoms may show up as early as age four or five, or may not appear until age thirty.

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will continue his previous behavior, will constitute a continuing threat to society, and will commit criminal acts of violence.

Dr. Grigson's qualifications as a psychiatrist may be fine, but I find no testimony which qualifies him as an expert in predicting the future. Yet his testimony more than once contains his opinion of how appellant *will* behave in the future, even to the point of expert testimony on the very issue as worded and submitted under Art. 37.071(b)(2), V.A.C.C.P. It is my opinion that such future-telling testimony is admissible under no theory of law and prejudicial beyond relief, requiring reversal of this case. If the majority find future-telling testimony proper, the Legislature should provide for the trial for crimes in futuro, so that criminals may be removed from our midst before they do their damage, but I can subscribe to no such theory.[2]

I also question the logical structure of Dr. Grigson's testimony. It appears he testified: (1) appellant lacks a conscience; (2) sociopaths lack a conscience; (3) therefore, appellant is a sociopath. The fallacy of this is obvious, but it did not stop here. Other characteristics of sociopaths were described and attributed to appellant, despite the fact that no examination findings of such other traits were presented. The expert testimony went far afield of any demonstrated logical connection to the results of appellant's examination by the psychiatrist.

I next question the state of the medical sciences in the field of psychiatry with respect to the sociopathic personality disorder. Dr. Grigson testified that the causes are unknown and no cure or treatment is known. He also testified that symptoms may appear as early as age four

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[2] Is the majority's position best stated by the Queen in Lewis Carroll's *Through the Looking Glass* (Modern Lib. Ed., p. 226)?

"For instance, now, [the Queen states to Alice] * * * there's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all."

years, or that given proper environmental conditions no overt behavior or manifestations may appear. Although he testified it is not known what causes a sociopathic condition, he admitted much research has been done to find an answer. The writings in the field support that assertion and reflect that numerous theories of the cause have been advanced. One textbook on abnormal psychology[3] discusses the history, theory, and description of the sociopathic personality, which has been studied since the early 1800's and has been variously labelled as moral insanity, *manie sans delire*, psychopath, constitutional psychopath, and sociopath. Theories have attributed the cause to heredity, brain damage, early family relations, inadequate socialization, inadequate learning capabilities, stimulation-seeking, and low anxiety level. Primary and secondary sources cited in the brief discussion of the sociopathic personality contained in the above cited text number close to fifty.

In Romero v. State, 493 S.W.2d 206, with respect to the admission of the results of polygraph examinations, this Court quoted with approval the following rule from Frye v. United States, 54 App.D.C. 46, 293 F. 1013, 1014 (1923):

> ". . . Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

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[3] Ullmann, L. P., and Krasner, L., *A psychological approach to abnormal behavior*, Englewood Cliffs, N.J.: Prentice-Hall, 1969, pp. 444-457.

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This test has also been applied to evidence derived from other scientific theories and devices by federal courts.[4] There is no reason why it should not be applied to scientific theories in the field of psychiatry.

In Hopkins v. State, 480 S.W.2d 212, at 221, speaking to psychiatric evidence of another nature, the following observations were made regarding that field of medicine:

> "The state of psychiatry is such that it is more an art than a science. There exists a great deal of divergency of opinion among eminently qualified and learned men of the profession. Also, being of the nature that it is, psychiatric opinion is not only often divergent, but is often inexact."

While it is true that the profession of psychiatry has much to contribute to that of law, and on certain issues the evidence of the psychiatrist can be of great assistance to the trial of a case, in view of the numerous speculations made on the basis of the single determination that appellant lacked a sense of remorse for the commission of the offense for which he was on trial, in view of the issue upon which those speculations were presented, and in view of the weight which those speculations by an expert undoubtedly carried, I am unable to find that much of the testimony offered was from this side of the twilight zone. The introduction of such highly prejudicial psychiatric speculations deprived appellant of a fair trial at the punishment stage.

These several reasons reveal that the psychiatric testimony contributes nothing to the State's burden on special issue number two. Accordingly, the only arguably probative evidence on this issue remaining of those enumerated by the majority consists of the circumstances of the instant offense. How much can one tell from a single event? I would hold as a matter of law that

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[4] See United States v. Addison, 498 F.2d 741 (D.C.Cir. 1974); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973); United States v. Stifel, 433 F.2d 430 (5th Cir. 1970).

the circumstances of the offense for which one is on trial, *standing alone*, are insufficient to prove, *beyond a reasonable doubt*, the probability that the offender will commit criminal acts of violence *constituting a continuing threat to society*.

The issue of the sufficiency of the evidence to support this special issue is one of first impression. This State does not even have an authoritative interpretation of what the issue means. I dissent to the majority's failure to address the probative value of the evidence they so easily find sufficient on this little understood issue.

II.

In his third ground of error, appellant contests the application of the law of principals to the special issues in Article 37.071(b)(1) and (3), V.A.C.C.P. In response the majority assert without elaboration, explanation, or authority, "To agree with such contention would require that we ignore this Court's interpretation of the law of principals." The law of principals dictates, "Where several people are acting together in pursuit of an unlawful act, each one is liable for collateral crimes, even though unplanned and unintended, committed by other principals if those crimes are the foreseeable, ordinary and probable consequences of the preparation or execution of the unlawful act." Thompson v. State, 514 S.W.2d 275. (Cf. V.T.C.A. Penal Code Chapter 7.) I am aware of no cases that have held special penalty provisions may be applied to one party on the basis of their applicability to a co-principal. The majority's holding would support enhancement of a first-time offender's punishment to life imprisonment under Article 63, V.A.P.C., if his co-principal were twice previously convicted of a felony. Furthermore, the reasoning of the majority would dictate that not just the first and third special issues, but all three, may be answered on the basis of the role and characteristics of co-principals rather than solely in response to the individual defendant. The special issues were framed by the Legislature in parallel construction, each issue

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addressing the individual defendant:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." (Art. 37.071(b), V.A.C.C.P.)

Since the majority apply the law of principals to the first and third issues, why not also to the second, and let the life of the convicted man rest upon whether there is a probability that one of his co-principals will commit criminal acts of violence that would constitute a continuing threat to society? The absurdity of applying the law of principals to these special issues is manifest.

The majority's automatic application of the law of principals to special punishment issues constitutes a radical departure from the ancient concept of individualized punishment, a cornerstone of our system of criminal justice. It should not be so lightly abandoned.

III.

I dissent to the majority's disposition of appellant's fifth and sixth grounds of error which challenge the constitutionality of Article 37.071, V.A.C.C.P. I believe that statute to be unconstitutional for the reasons stated in my opinion concurring in part and dissenting in part in Jurek v. State, 522 S.W.2d 934.[5]

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[5] See also Judge Roberts' dissenting opinion in *Jurek*.

IV.

In his seventh ground of error, appellant argues that the oath required of jurors in a capital case[6] imposes "an unrealistic condition on prospective jurors. No juror, or at least only a *minute* percentage could deliberate issues of fact without being affected by the spectre of death or the gift of life." Appellant then argues that the oath prevents a defendant from having a jury drawn from a cross-section of the community in that it eliminates many truthful and conscientious veniremen.

The first part of this argument was accepted by the majority as the basis for the reversal in Hovila v. State, ____ S.W.2d ____ (No. 49,396, April 30, 1975), where it was held:

> "While the new statutes provide that the jury shall take an oath that they will not let the penalty involved affect their deliberations and requires them only to answer questions while the judge actually assesses the punishment based on such answers, the fact remains that the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment. *To say that the jury's answers would not be affected by their attitude toward the death penalty* as a punishment for crime simply because they will not bring forth the ultimate verdict *would be to disregard the obvious.* We will not engage in such tenuous reasoning." (Emphasis added.)

The second part of appellant's argument follows logically from the first: if the oath is required, but will not be followed, only those who falsely state they will be uninfluenced may serve and all who truthfully admit they will be influenced will be excluded. If the majority in Ho-

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[6] Article 1257(d), V.A.P.C., provides in part:

> "... No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

vila, supra, were correct,[7] then appellant's argument is logically sound. In spite of this, the majority have neglected to answer this portion of appellant's seventh ground of error. I dissent to their failure to do so.

V.

In summary, I dissent to the majority's failure to address in an adequate manner the issue of the sufficiency of the evidence to show the probability required under Art. 37.071(b)(2), supra; I dissent to the majority's summary application of the law of principals to the special punishment issues; I dissent to the majority's failure to address that portion of appellant's argument directed at the jury selection process; and I adhere to my views expressed in Jurek v. State, supra, upon which reasoning I would reform the punishment to life and affirm the conviction.

I therefore concur in the affirmance of this conviction but would reform the judgment to life.

ODOM, Judge

(Delivered February 18, 1976).

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[7] Note my dissent in Hovila v. State, supra, on several grounds, including inconsistency with Jurek v. State, supra.

ERNEST BENJAMIN SMITH, Jr., Appellant

NO. 49,809 vs. - - - - Appeal from DALLAS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

I concur completely with the dissenting opinion of Judge Odom, except that I would reverse this case for the reasons stated in my dissenting opinion in Jurek v. State, 522 S.W.2d 934, 946-950 (Tex.Cr.App. 1975). See my concurring statement in Hovila v. State, ____ S.W.2d ____, ____ (Tex.Cr.App. 1976), No. 49,396, delivered April 30, 1975; State's Motion for Rehearing overruled February 11, 1976.

ROBERTS, Judge

(Delivered February 18, 1976).

WITHDRAWN

Prisoner's name: Ernest Benjamin Smith

Prison number: 000-515

Place of Confinement: Ellis Unit, Texas Department of Corrections

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, and	§	No. CA 3-77-0544-F
	§	
_____ WARDEN ELLIS UNIT, TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
Respondents.	§	

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY -
Filed April 21, 1977

To the Honorable _____, Judge of the District Court for the Northern District of Texas, Dallas Division:

[*Preliminary explanation:* The allegations of paragraph 1 through 17 of this petition are in the form dictated by the Model Form for Use in Applications for Habeas Corpus under 28 U.S.C. § 2254, prescribed by the Rules

Governing Section 2254 Cases in the United States District Courts, 44 U.S.L.W. 4554-4556 (April 26, 1976). Paragraphs 1 through 11 state the history of prior state-court proceedings; paragraph 12 states the federal constitutional claims presented; paragraphs 13 through 17 contain required technical information.]

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

(a) The 195th District Court of the State of Texas, in and for Dallas County.

(b) Dallas, Dallas County, Texas.

2. The date of the judgment of conviction is March 26, 1974. An amended sentence of death was entered on March 22, 1977.

3. The sentence is that Ernest Benjamin Smith be put to death by electrocution.

4. The nature of the offense involved is that Ernest Benjamin Smith was charged with murder with malice aforethought, in violation of section 1257(b)(2) of the Texas Penal Code, in that he allegedly participated in a robbery in the course of which another individual, one Howie Ray Robinson, killed William Moon.

5. Ernest Benjamin Smith's plea was not guilty.

6. Trial of the issues of guilt or innocence and of sentence was had before a jury.

7. Ernest Benjamin Smith testified at trial of the issue of guilt or innocence. He did not testify at trial of the issue of sentence.

8. Ernest Benjamin Smith appealed his conviction and death sentence.

9. The facts of Ernest Benjamin Smith's appeal are as follows:

(a) The Court of Criminal Appeals of Texas affirmed the judgment of the trial court on February 18, 1976, in *Smith* v. *State*, 540 S.W.2d 693. (Judges Odom and Roberts dissented with respect to the sentence of death, in separate opinions which were subsequently withdrawn and are unreported.)

(b) The Court of Criminal Appeals of Texas denied Ernest Benjamin Smith's motion for rehearing on July 14, 1976.

(c) The Supreme Court of the United States denied Ernest Benjamin Smith's petition for a writ of certiorari on March 7, 1977. ____U.S.____, 45 U.S.L.W. 3601. (Justices Brennan, Marshall and White were of the opinion that certiorari should be granted).

10. Other than the appeal described in paragraphs 8 and 9 above, the only petitions, applications, motions or proceedings filed or maintained by Ernest Benjamin Smith with respect to the judgment of March 26, 1974 of the 195th Judicial District Court of Texas are those described in paragraph 11 below.

11. (a) On April 18, 1977, pursuant to Article 11.07 of the Texas Code Crim. Pro., a Petition for Writ of Habeas Corpus was filed in the 195th Judicial District Court of Texas by counsel on behalf of Ernest Benjamin Smith. The Petition was denied by the Honorable R. T. Scales, Judge of the 195th Judicial District, on April 18, 1977, without a hearing.

(b) On April 19, 1977 pursuant to Article 11.07 of the Texas Code Crim. Pro., a Petition for Writ of Habeas Corpus was filed in the Texas Court of Criminal Appeals by counsel on behalf of Ernest Benjamin Smith. This Petition was denied on April 19, 1977, without a hearing. (A Certified Copy of the April 19, 1977 Order of the Texas Court of Criminal Appeals denying Ernest Benjamin Smith's Petition is annexed hereto as Exhibit A.)

12. This petition is directed to Ernest Benjamin Smith's conviction and to his sentence, which were obtained and imposed in volation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as described more fully herein.

INTRODUCTORY FACTS

Petitioner's conviction and sentence of death were the result of a convenience store robbery which was carried

out by three men and resulted in the shooting death of a night clerk. The unrefuted evidence is that petitioner did not fire a shot and that the clerk was killed by Howie Ray Robinson. R. 2672, 2739.[1] After petitioner and Robinson entered the store and announced their intention to hold it up, the clerk (who had access to a gun located under the counter, R. 2740, 2674, and customarily kept a second gun in his pocket when he worked at night, R. 2592-93), reached for something. T. 2672, 2738. The record contains unrefuted evidence that the gun which petitioner was carrying was a gun which would not fire and that petitioner knew that it would not fire. R. 2732-33, 2913-14. The evidence is in conflict as to whether petitioner nevertheless attempted to fire the gun when he saw the clerk reach for something. R. 2672, 2738-39, 2743, 2762-63, 2950. The evidence is also in conflict as to whether, at the same time, petitioner said to Robinson, "'Look out, Howie,'" R. 2738, or words to that effect, R. 2950, or "'Get him Howie,'" R. 2672.

Affirmative jury responses to the issues determinative of petitioner's sentence of death followed testimony by his step-mother and aunt as to his truthfulness, loyalty, scholarliness and dependability, and his honorable discharge after service in Vietnam, R. 2919-20, 2920-23, and confirmation, by the owner of the gun petitioner was carrying during the robbery, that the gun had been defective. R. 2913-14. The State presented only the testimony of Dr. James Grigson who testified that petitioner was a sociopath and therefore likely to commit future acts of criminal violence, R. 2943-47, and reported his recollection of petitioner's account to him of the circumstances surrounding the shooting, R. 2950-53, 2959-60, 2960-61.

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[1] Citations to the Record on Appeal are designated "R." followed by the appropriate page number.

GROUNDS OF ILLEGALITY OF PETITIONER'S CONVICTION AND DEATH SENTENCE

A. Petitioner's Death Sentence is a Cruel and Unusual Punishment Forbidden by the Eighth Amendment to the Constitution of the United States, and Deprives Him of Due Process of Law and Equal Protection of the Laws in Violation of the Fourteenth Amendment to the Constitution of the United States.

(1) Death is a disproportionately severe and therefore excessive punishment in cases like petitioner's where human life has not been taken deliberately by the individual offender who is sentenced to die.

(a) Imposition of the death penalty in a case where a life has not been taken deliberately by the individual sentenced to die fails to accord with contemporary values concerning the dignity of man.

(b) Public opinion does not support use of the death penalty in cases in which life was not taken deliberately by the individual defendant himself.

(c) The Texas legislative enactments which have been interpreted to authorize the execution of non-triggermen do not evince public support for use of the death penalty in such cases, since it was not the intent of the legislature that the enactments would have such broad sweep.

(d) National and international use of the death penalty against non-triggermen has shown a dramatic and consistent decline culminating, in all American jurisdictions and in virtually all other jurisdictions, in *de facto* abolition.

(e) Prosecutors with discretion to effect a less than capital sentence in the case of a non-triggerman do so in the overwhelming majority of cases.

(f) Jurors with discretion to effect a less than capital sentence in the case of a non-triggerman do so in the overwhelming majority of cases.

(g) Executive officers with discretion to effect a less than capital sentence in the case of a non-triggerman do

so in the overwhelming majority of cases.

(h) Use of the death penalty against non-triggermen is inconsistent with contemporary morality and standards of decency.

(2) Death is a disproportionately severe and therefore excessive punishment in petitioner's case, in view of the circumstances of the particular offense and the character, record and life history of the individual offender.

(a) Petitioner's sentencing hearing occurred on March 26, 1974. It was not until April 16, 1975 that the Texas Court of Criminal Appeals announced its views as to the range of issues that might be considered "[i]n determining the likelihood that the [capital] defendant would be a continuing threat to society." *Jurek* v. *State*, 522 S.W.2d 934, 939-40 (Tex.Cr.App. 1975). It was not until July 2, 1976 that the Supreme Court of the United States held that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, ____U.S.____, 49 L.Ed.2d 944, 961 (1976).

(b) Numerous circumstances, some within and some outside the trial record, are present in petitioner's case and are, by common consensus, deemed to warrant mitigation of sentence in capital cases. They include:

(i) The record of dependability, character, and good citizenship which petitioner demonstrated during the first 25 years of his life.

(ii) His record of service in Vietnam.

(iii) The fact that his only prior conviction was for possession of a small matchbox partially filled with marijuana, for which he was sentenced to probation.

(iv) Extenuating pressures leading to his participation in the crime.

(v) The fact that he did not shoot the victim.

(vi) The fact that, contrary to the testimony of Dr. Grigson,[2] petitioner suffers no antisocial personality

[2] Reliance upon a diagnosis by Dr. Grigson similar to that made in

disorder, and his prospects for rehabilitation are excellent.

(vii) The fact that, contrary to the testimony of Dr. Grigson, petitioner is remorseful regarding the killing of Mr. Robinson's victim.

(c) These factors are not outweighed by aggravating circumstances.

(3) **The Texas death penalty statutes, as interpreted and applied in petitioner's case, fail to allow constitutionally adequate consideration of mitigating circumstances.**

(a) Petitioner realleges Paragraph 12 (A) (2) (a) above. Although "in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing to consider mitigating circumstances" [(*Jurek* v. *Texas*, 49 L.Ed.2d 929, 940 (1976)] and "[t]hus, the constitutionality of the Texas procedures turns on whether [they] . . . allow consideration of particularized mitigating factors" (*ibid.*), these requirements were neither established, known, nor observed at the time of petitioner's trial.

(b) The fact that the defendant was not the triggerman in a felony murder is, by common consensus, mitigating and worthy of consideration in the assessment of punishment.

(c) The relative culpability of one of several participants in a felony is, by common consensus, worthy of consideration in the assessment of punishment, and such consideration is likely to point to mitigating circumstances.

(d) However, the Texas capital punishment statutes, as interpreted and applied by the Court of Criminal Appeals in petitioner's case, require that the death penalty be meted out to non-triggermen on the basis of the applicability to the triggerman of the special questions

this case has been found, by a panel of the Fifth Circuit, to be "clearly erroneous" in that his findings were "discredit[ed]" by "extensive medical and lay evidence" to the contrary. *Bruce* v. *Estelle*, 536 F.2d 1051, 1060-61 (C.A.5, 1976).

defined by Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (1) and (3). Thus, defendants like petitioner are sentenced to die on the basis of the culpability of another person's conduct, and they are denied consideration of relevant mitigating circumstances arising from their own less culpable role in the offense.

(e) The only death-sentencing issue under Texas law which requires or permits the jury to consider the character and record of the individual non-triggerman defendant such as petitioner is the issue defined by Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (2), relating to a "probability" of future dangerousness. This issue precludes consideration (unless a jury is willing to ignore the statute) of numerous factors which are mitigating by common consensus, but irrelevant to the "probability" issue. They include:

(i) The youth of an offender who was not, at the time of his offense, under the domination of another.

(ii) Evidence that the defendant will not kill (again) or that any "acts of criminal violence" which he may commit in the future will not result in serious injury.

(iii) A history of deprivation and misfortune which moderates blameworthiness, but does not negate the existence of "a probability" that the defendant will commit future acts of criminal violence.

(iv) The magnitude of the probability that the defendant will commit future acts of criminal violence.

(v) The possibility or probability that the defendant will *not* commit future acts of criminal violence.

(4) **The death penalty is unjustified as a means for achieving any legitimate governmental end and is therefore excessive.**

(a) The death penalty provided by Texas law violates the principle that a criminal sanction "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg* v. *Georgia*, 49 L.Ed.2d 859, 880 (1976).

(b) Public sentiment for retribution is not so strong as to require or justify use of the death penalty.

(c) Executions do not have an identifiable deterrent effect.

(d) Executions set socially sanctioned examples of, and provide an inducement to violence.

(e) There is no penal purpose served by execution which is not more effectively or more efficiently served by life imprisonment.

(5) **The penalty of death for an offender like petitioner who did not take human life himself is excessive because it is not warranted by any legitimate governmental purpose and is repudiated by the evolving standards of decency of contemporary society.**

(a) Petitioner realleges paragraphs 12 (A) (1) (b)-(h) and (4) (a)-(e) above.

(b) Public sentiment for retribution in the case of a non-triggerman is not so strong as to require or justify use of the death penalty.

(c) Executions of non-triggermen do not deter the commission of felonies, such as armed robbery, the reasonable consequence of which might be the death of the victim or another, nor do they deter the commission of murder.

(d) There is no penal purpose served by the execution of non-triggermen which is not more effectively or more efficiently served by life imprisonment.

(6) **The present Texas death penalty procedures, as applied since their enactment in 1973, have resulted in arbitrary and capricious imposition of the death penalty, and were applied to sentence this petitioner to death in an arbitrary and capricious manner.**

(a) The Supreme Court of the United States has upheld the Texas capital punishment statutes on their face only upon the assumption that they will assure that sentences of death are not wantonly or freakishly imposed. As those statutes have been applied since 1973, however, death sentences in Texas are in fact imposed in an arbitrary and capricious, wanton and freakish pattern.

(b) Cases similar to that of petitioner in all respects, including the age, prior record, relative culpability in

connection with the offense, and life and character of the accused, result, with overwhelming greater frequency, in lesser punishments than death.

(c) Cases more aggravated than that of petitioner in all respects, including the age, prior record, relative culpability in connection with the offense, and life and character of the accused, result, with overwhelming greater frequency, in lesser punishments than death.

(d) There is no rational, constitutionally permissible basis for distinguishing the few cases in which the death penalty has imposed from the many cases in which it has not been imposed.

(e) There is no rational, constitutionally permissible basis for distinguishing the few cases in which the death penalty has been imposed upon non-triggermen in felony-murder cases from the many such cases in which it has not been imposed.

(f) The Supreme Court's decision to uphold the Texas capital punishment statutes was based, in part, upon the assumption that prompt judicial review of the jury's decision in a court with statewide jurisdiction provided a means to promote the evenhanded, rational, and consistent imposition of death sentences. However, the Texas Court of Criminal Appeals has not reviewed capital sentences to assure that they are evenhanded, rational and consistent, and it has held that it lacks authority to do so.

(g) Under Texas law the death penalty must be imposed if the jury makes certain findings against the defendant. The sentencing procedure is so rigid as to preclude consideration of factors commonly deemed mitigating, including even such significant facts as whether the defendant was the triggerman. This rigidity increases the likelihood of arbitrariness.

(7) **Under the present Texas death penalty procedures, and particularly in cases in which human life is not taken by the offender himself, the death penalty is discriminatorily applied against defendants of ethnic minority extraction, impoverished defendants, and male defendants, upon the sole**

ground of race, poverty and sex; and petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice.

(a) The death penalty in the United States and in the State of Texas has been discriminatorily imposed against ethnic minorities, poor persons and males.

(b) The death penalty for crimes less serious than the deliberate taking of human life has been discriminatorily imposed against ethnic minorities, poor persons and males.

(c) The death penalty for non-triggermen has been discriminatorily imposed against ethnic minorities, poor persons and males.

(d) The probability of execution is overwhelmingly greater in the case of a black non-triggerman than in the case of a white non-triggerman.

(e) General use of the death penalty for non-triggerman today would be intolerable to juries and the public. Continued, occasional use of the death penalty against non-triggermen is possible only because an absence of empathy on the part of the majority population, resulting from racial and class differences, serves to blunt moral and political reaction against an otherwise intolerable practice.

(8) **The prediction of a probability of future dangerousness required by Texas law and made in petitioner's case as the basis for the imposition of the death penalty is so uncertain, vague, unreliable and prone to error on the side of overinclusion that it fails adequately to channel the sentencing decision patterns of juries, and is arbitrary.**

(a) Under the terms of Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (2), the lives of defendants like petitioner who are convicted of capital offenses depend upon the prediction that there is "a probability" that they will "commit criminal acts of violence" that will "constitute a continuing threat to society."

(b) The reliable prediction of future dangerousness is impossible.

(c) The reliable prediction of the "probability" defined by Art. 37.071 (b) (2) is impossible.

(d) Specifically, reliable prediction of the kinds described in paragrahs 12 (A) (8) (b)-(c) above cannot be made in the case of an offender like petitioner, who has not personally committed a deadly assault.

(e) Predictions of the future dangerousness of individuals in the context of legal proceedings conducted for purposes of criminal sentencing or involuntary commitment invariably err on the side of overinclusion.

(f) The classification of offenders who are to be executed on the basis of a "probability" of future dangerousness fails to set reasonably clear guidelines for triers of fact in order to prevent arbitrary and discriminatory enforcement, because the classification is universal, and thus unjustifiably broad, or so vague as to be incomprehensible.

(g) The classification of offenders who are to be executed on the basis of a prediction of "criminal acts of violence that would constitute a continuing threat to society" similarly fails to channel sentencing discretion because the classification is unjustifiably broad and so vague as to be incomprehensible.

(9) **The finding of petitioner's future dangerousness was based upon an inadequate inquiry and insubstantial evidence, with the result that the procedure used to sentence him to die failed to provide a reliable determination of the appropriateness of the death sentence in this specific case.**

(a) The finding of petitioner's jury that there was a probability of his future dangerousness was made through procedures and upon evidence that failed to assure the requisite reliability in the determination that death is the appropriate punishment herein.

(b) The State's entire case as to the probability of petitioner's future dangerousness was the testimony of a single forensic psychiatrist, Dr. James Grigson, who had conducted no investigation, testing, or evaluation other than the traditional "mental status examination," R. 2937, which was, by his testimony, completed in an

interview lasting approximately one and one half hours and which petitioner recalls as having consumed approximately forty minutes.

(c) The principal basis for Dr. Grigson's diagnosis was his failure to detect in petitioner any signs of remorse or guilt for the crime of which he was charged. R. 2941, 2949, 2951, 2960. Petitioner was precluded from testifying as to whether he did in fact regret that the robbery and shooting had occurred. R. 2744.

(d) Responsible prediction of future dangerousness on the basis of a single psychiatric interview of up to an hour and a half in length is impossible.

(e) The examination conducted by Dr. Grigson was inadequate to form the basis of a responsible prediction of future dangerousness.

(10) **Electrocution is an unnecessary cruel means of execution.**

(a) Electrocution involves physical torture and is excessively cruel and unnecessary, in this age of painless drugs, as a means of extinguishing human life.

(b) In the light of contemporary human knowledge, electrocution as a means of execution serves no purpose other than the gratuitous infliction of suffering.

(11) **The Texas death penalty statutes, as interpreted and applied in petitioner's case, make the life or death of a defendant who is convicted of a homicide that he did not personally commit turn upon (i) the intention and "reasonable expectation" of a person other than the defendant, and (ii) the unreasonableness (in response to provocation) of a person other than the defendant, which classifications are wholly irrational, arbitrary, and lacking in any nexus or relationship to any conceivable purpose for inflicting the death penalty upon a particular offender.**

(a) Petitioner realleges paragraph 12 (A) (3) (d) above.

(b) The interpretation of Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (1) and (3) which was employed to authorize petitioner's death sentence

makes a non-triggerman susceptible or immune to capital punishment on the sole ground of mental processes of the triggerman that have nothing to do with the conduct, character, thought or culpability of the non-triggerman. Offenders like petitioner are thereby put to death or spared by virtue of an irrational classification which bears no relationship to the purposes of capital punishment.

B. The Introduction of the Testimony of Dr. Grigson at Petitioner's Trial Violated His Privilege Against Self-incrimination and His Rights to Fair Notice and Effective Assistance of Counsel.

(1) Petitioner was examined by a psychiatrist, Dr. James Grigson, while detained in custody prior to trial. Dr. Grigson told petitioner that the Court had sent him to conduct a psychiatric evaluation of petitioner. The record is silent, and neither petitioner nor his counsel has information, as to why a psychiatric evaluation was ordered prior to his trial.

(2) Permission of petitioner's counsel was not obtained prior to the psychiatric interview, nor was counsel notified that the interview was to take place.

(3) The record contains a letter dated February 28, 1974 from Dr. Grigson to the Court which sets forth a one-paragraph "summary" of Dr. Grigson's psychiatric evaluation of petitioner; concludes "that Earnest [sic] Benjamin Smith, Jr. is aware of the difference between right and wrong and is able to aid an attorney in his defense;" and adds, "If I can be of any further help to you regarding this case, please let me know. He is a severe sociopath." R. 24.

(4) By order filed January 4, 1974, upon petitioner's motion, the State's attorney was directed "to list all the State's witnesses whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state [sic] and the punishment stage." T. 21-22.

(5) Dr. Grigson was not listed as a State's witness, and counsel for petitioner did not know until approx-

imately ten minutes before Dr. Grigson testified that he was to be a witness for the State.

(6) On at least one occasion, on an unknown date prior to the commencement of petitioner's trial, the district attorney consulted with Dr. Grigson regarding his findings concerning petitioner, R. 2928, and told Dr. Grigson that he would be asked to testify at petitioner's trial, R. 2930.

(7) The circumstances set forth in paragraphs 12(B)(1)-(6) above, prevented petitioner's trial counsel from effectively defending against the charge that there existed a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society.

(8) Petitioner was not told before or during the psychiatric interview that his statements during the interview could be used against him at trial.

(9) Petitioner was not told before or during the psychiatric interview that he had a right to consult with his counsel and/or to have counsel present.

(10) Petitioner was not told before or during the psychiatric interview that he had a right to remain silent.

(11) Petitioner was not told before or during the psychiatric interview that he had a right to terminate the interview at any time.

(12) No circumstance pertaining to the interview provided notice to petitioner that it had any adversarial purpose or that his statements could form the basis of, or be used as evidence to support, a determination that he should be put to death.

(13) After defense counsel's attempt to protest had been overridden by the Court, R. 2950, Dr. Grigson related on cross examination, R. 2950-56, and redirect examination, R. 2960-61, his recollection of facts of the crime as told to him by petitioner during the psychiatric interview.

(14) Petitioner was unwittingly induced to provide, by his own statements, the only evidence offered by the prosecution to suggest that he might be dangerous in the future and should therefore be put to death.

C. The Prosecuting Attorney Made Persistent, Immaterial, Improper References to and Suggestions of Unrelated Criminal Activity By Petitioner, at Both the Guilt and Sentencing Phases of Petitioner's Trial.

(1) By order of the trial court, issued upon petitioner's motion, the State was instructed "to not mention, infer, or in any way allude to any extraneous offense against defendant which has not resulted in *final* conviction," that "the State not put a witness on the stand to infer, directly or indirectly, that defendant has committed any offense other than the one with which he is charged in this proceeding," R. 65, and that "the prosecutors by instructed, and they instruct their witnesses, not to refer to, or allude to defendant by the nickname of 'dirty Red,' . . . a juvenile reference to the color of defendant's skin," or by any other nickname, R. 64.

(2) In cross-examining petitioner about his marijuana conviction, the prosecutor asked "You've had plenty of experience with lawyers before haven't you?" R. 2752

(3) In asking petitioner who had carried a box of change from the robbery, the prosecutor elicited the answer, "I can't even remember. I don't know." R. 2778. The prosecutor continued:

"Q. Whole event was so — didn't mean any more to you than anything, did it?

Q. Well, when a person is killed — I've seen a lot of people killed overseas and well, it does register on your mind, you know. You see somebody and you don't know what happened and — well, I hadn't been around anything like that, you know, since I had been home.

Q. Run that past me again, I think you said what I thought you said.

A. When — say for instance —

Q. You're talking about a robbery? You haven't been around one of those?" (R. 2779).

(4) The prosecutor questioned petitioner about the shoes he was wearing on the day of the crime, as follows:

"Q. . . . You were in your sneakers?

A. Good shoes are shoes I didn't wear —
Q. When you're robbing?" (R. 2795).

(5) Referring to petitioner's activities on September 29, the day upon which the Wheeler gun was sold, R. 2796, and upon which petitioner was said to have appeared in a store carrying a gun, T. 2839-2839, the prosecutor questioned petitioner as follows:

"Q. Okay. Now, of course, you hadn't planned on running into George Holden when you went over to Troy Brown's house?
A. I didn't see him.
Q. You weren't planning on running into him, were you?
A. No. Well, I didn't know where he was, really.
Q. No reason for you to think that George Holden would want to get some more money or anything that night?
A. (Nods head from left to right)
Q. I'm talking about the next night.
A. I was pretty nervous. I was going to stay home, regardless.
Q. Uh-huh . . ." (R. 2797-2798).

(6) The prosecutor asked the officer who reported petitioner's confession: "Under what name or names did you know of . . . [petitioner]?" After an objection to the question was sustained, the following exchange occurred:

"Q. (by Mr. Mulder) Without going into what name you knew him by, did you know him by a street name or a calling name?
A. Yes, sir, I did.
Q. It was other than Ernest Benjamin Smith?
A. Yes, sir. It was Dirty Red." (R. 2663)

(7) A second state witness identified prisoner as "Red," and questioning by the prosecutor proceeded as follows:

"Q. You said there was another called Red?
A. Right.
Q. Is that the name you knew him by?
A. Yes.

Q. Do you see Red in the Courtroom today?
A. Yes." (R. 2809)

(8) A third state witness also identified petitioner as Red, R. 2822, and when the prosecution asked "Was it just Red or was it something Red?," the witness responded that "it was Dirty Red." R. 2823.

(9) On rebuttal, the state presented two witnesses who testified that petitioner had entered the stores in which they were working as cashiers, carrying a gun which was described by one as being an automatic, six inches long, metallic in color with a pearl handle, R. 2835-2836, and by the other as a "white pearl handled gun with a chrome barrel, automatic," R. 2839. Although petitioner had testified on cross examination that he did not "own" a pistol, R. 2732, there had been no evidence whatsoever regarding ownership, possession or use of a gun that resembled in any way the gun described by these witnesses.

(10) Petitioner had no prior record other than the marijuana conviction described in paragraph 12(A)(2)(b) above, and the prosecution did not prove the commission of any other crime.

(11) The jury was not instructed to disregard the testimony described above, but was permitted to use it in determining guilt *and* in determining the issues dispositive of petitioner's sentence. The prosecutor relied upon some of this improper evidence [*Smith v. State*, 540 S.W.2d 693, 698 (Tex.Cr.App. 1976)] in his closing argument at the sentencing hearing (R. 2973).

(12) The introduction of the testimony described in above was a contrivance by the prosecution to obtain a conviction and sentence of death. Its cumulative result was prejudicial and a denial of the process due when life is at stake in a criminal proceeding.

D. An Oral Statement Was Obtained From Petitioner Involuntarily, In Derogation and Without Effective Waiver of His Privilege Against Self-incrimination and His Right to Counsel.

(1) Petitioner's oral statement to Officer C. E. Lewis was admitted at trial.

(2) This statement was obtained from petitioner involuntarily, without a knowing and intelligent waiver of his right to counsel and of his privilege against self-incrimination.

(3) Petitioner did not at any time give or sign a written, inculpatory statement, but sought to exercise his privilege to remain silent and to preserve his right against self-incrimination.

(4) Petitioner was arrested on October 5, 1973. R. 2706.

(5) Counsel was first appointed for petitioner by order dated October 25, 1973. R.9.

(6) John F. Simmons, the attorney appointed by the October 25 order, was first notified on his appointment to petitioner's case on October 27, 1973 and first saw petitioner on November 4, 1973.

(7) On the date of the order appointing counsel for petitioner, Officer C. E. Lewis interviewed petitioner in the absence of counsel.

(8) Officer Lewis advised petitioner (a) that he was not seeking evidence which could be used at trial; (b) that oral statements were inadmissable at trial; (c) that the gun taken during the robbery had belonged to the deceased, William Moon; (d) that the family of the deceased wanted very much to recover the gun; and (e) that the purpose of his interview was to determine its location (see R. 2666). The gun taken during the robbery was, in fact, the property of George Wheeler, R. 2584, and that fact was known to officer Lewis when he interviewed petitioner on October 25, 1973. Petitioner's subsequent oral statement was deemed admissable at trial because it resulted indirectly in discovery by the police of "fruits of the crime," *i.e.*, the pistol belonging to George Wheeler. R. 75.

E. The Process of Selecting Petitioner's Trial Jury In Which Veniremen With Conscientious Objections to the Death Penalty Were Systematically Excused for Cause Without Adequate Inquiry Upon Voir Dire Examination, Violated Petitioner's Rights Under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

(1) Petitioner was denied trial by a jury selected through fair procedures, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(a) Persons opposed to the imposition of capital punishment in the case of non-triggerman do not thereby make it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Witherspoon v. Illinois*, 391 U.S. 510, 522 n. 21 (1968) (emphasis in original).

(b) Despite two written, contemporaneous motions opposing the practice, R. 26-28, 29, eleven prospective jurors who otherwise favored the death penalty were excused — eight for cause and three by agreement — because they expressed general opposition to use of the death penalty against a non-triggerman; expressed an inability, or an uncertainty regarding their ability, to impose a death sentence upon a non-triggerman; or stated that the penalty would affect their deliberations in the case of a non-triggerman. R. 178, 489, 694, 962, 1197, 1730, 1848, 2223, 2231, 2403, 2446.

(c) Seven prospective jurors were excused — four for cause and three by agreement of counsel — on the basis of general statements of opposition to capital punishment. R. 484, 1170, 1367, 1687, 1802, 1956, 2143. None of these veniremen was instructed regarding Texas capital sentencing procedures or regarding the duty of a juror to set aside personal reservations and follow the law; and in none of these cases was it "unmistakably clear" that the venireman could not subordinate his sentiments against the death penalty to his duty to render responsible jury service and follow the court's instructions on the law.

(d) An additional prospective juror was excused for cause after stating that although ". . . in certain cases . . . [he] would be for it and give the death penalty", R.

2202, and would "consider" and "conditionally could impose the death penalty for a principal to murder," *ibid*, and that he thought capital punishment was a deterrent, R. 2206-07, his serious moral reservations about the death penalty made him disinclined to serve and led him to believe that he could not be "a competent juror," R. 2210.

(e) At the time of petitioner's trial, former Article 1257(d) of the Texas Penal Code sanctioned the exclusion for cause of prospective jurors in capital cases who were unable to swear that "the mandatory penalty of death or imprisonment for life . . . [would] not affect . . . their deliberations on any issue of fact."

(f) Fifteen prospective jurors in petitioner's case, some of whom were in favor of capital punishment and others of whom were not, were excused for their inability to take the Article 1257 (d) oath. R. 489, 1848, 2403, 2446, 377, 1165, 1308, 1425, 1802, 1839, 1874, 1913, 2226, 2235, 2416, 2498, 2499, 2502.

(g) Two prospective jurors who believed in the death penalty and thought themselves able to impose it were excused for cause after indicating that, in a capital case, they would require proof by a higher standard than what they understood the words "beyond a reasonable doubt" to imply. R. 684, 2429.

(2) **Petitioner was denied trial by a jury that was a representative cross section of the community, as required by the Sixth and Fourteenth Amendments to the Constitution of the United States.**

(a) Petitioner realleges paragraphs 12(E)(1)(a)-(g), above.

(b) The jury selected through the procedures just described was not a representative cross section of the community.

(3) **Petitioner was denied trial by a jury that was impartial and was not biased in favor of the prosecution, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.**

(a) Petitioner realleges paragraphs 12(E)(1)(a)-(g)

and (2)(b) above.

(b) Jurors without scruples against imposition of the death penalty tend to be biased in favor of the State in determining issues of fact.

(c) Jurors capable of deciding capital cases without being "affected" in their deliberations by the mandatory punishments of life imprisonment or death tend to be biased in favor of the State in determining issues of fact.

(d) Jurors capable of returning a verdict which they know will result in a sentence of death even in cases in which their personal choice of sentence would be life imprisonment or some lesser sentence tend to be biased in favor of the State in determining issues of fact.

(e) Jurors without scruples against imposition of the death penalty in the case of a non-triggerman tend to be biased in favor of the State in determining issues of fact.

(f) Jurors capable of deciding a capital case involving a non-triggerman without being "affected" in their deliberations by the mandatory punishments of life imprisonment or death tend to be biased in favor of the State in determining issues of fact.

(g) Jurors capable of returning a verdict which they know will result in a sentence of death in the case of a non-triggerman, even though their personal choice of sentence would be life imprisonment or some lesser punishment, tend to be biased in favor of the State in determining issues of fact.

(h) As a result of its selection through the procedures described above, the jury which convicted and sentenced petitioner was conviction-prone and incapable of rendering a fair and impartial verdict.

(4) Petition was denied trial by a jury that reflected contemporary standards of decency in the assessment of the penalty of death, as required by the Eight and Fourteenth Amendments to the Constitution of the United States.

(a) Petitioner realleges paragraphs 12(E)(1)(a)-(g) and (2)(b), above.

(b) Of the jurors who were sworn to try petitioner's

case, eleven said that they were generally in favor of the death penalty. R. 440, 585, 964, 1021-1022, 1316, 1526, 1988, 2121, 2347, 2452, 2530. Only three expressed reservations about it. R. 298, 1505, 2448. Three said that they believed that most, but not all, people convicted of capital crimes should receive death sentences. R. 985, 2478, 2551. Only one indicated that she thought the penalty appropriate in few capital cases. Seven indicated that their belief in the death penalty was longstanding. R. 440, 594, 966, 1022, 1316, 2369, 2530. Eight indicated that they believed in the death penalty for principals, R. 585-586; 965-966; 1027-1028; 1329, 1338, 1526; 2349; 2453; 2461; 1992; 1995, and a ninth juror said he had "no feeling" in that regard "other than to follow the letter of the law," R. 2533. The remaining three indicated that they were able to follow the law of principals, R. 310, 446-447, 2136, and able to answer the sentencing questions in a manner that would result in a death sentence for a principal, R. 315, 450, 2125. All who were asked stated that, in a capital murder case, they would not require proof of motive, R. 590, 976, 1043, 1345, or premeditation, R. 977, 1345; that they believed the death penalty appropriate even though there had been only one victim, R. 441, 586, 2122, 2348; and that they would not be led by the seriousness of the penalty to hold the State to a higher standard than proof beyond a reasonable doubt, R. 593, 978, 1025, 1346, 1520. All who were asked said they were able to take an oath that the mandatory penalties would not affect their deliberations on any issue of fact, T. 301, 588-589, 976, 1039-1040, 1342, 2137, 2357. And all who were asked said that if, after hearing the evidence, they became personally convinced that the defendant deserved a lesser penalty than death or life imprisonment, they could set aside that personal feeling in determining the case. R. 1026, 1039; 1509, 1518, 1523; 2127, 2136; 2004; 2454.

(c) Under Texas law, aberrant, disproportionately severe death sentences are uncorrectable by any authority save the standardless authority of the executive to grant clemency.

F. A Hearing Should Be Held To Determine Whether Petitioner's Trial Attorney Failed To Render Adequate And Effective Assistance Of Counsel.

(1) Petitioner realleges paragraph 12(E), above.

(2) Petitioner's counsel agreed or failed to object to the dismissal of death-scrupled veniremen at petitioner's trial.

(3) Petitioner's trial attorney would have a conflict of interest in alleging that he failed to render adequate and effective assistance of counsel.

(4) Petitioner should have other counsel assigned to represent him at a hearing to determine whether his trial attorney failed to render adequate and effective assistance of counsel.

13. Each of the grounds listed in paragraph 12 have been previously presented to the Texas courts, and each has been denied without a hearing.

14. There are no petitions or appeals presently pending in any state or federal court relating to the judgment under attack.

15. Ernest Benjamin Smith was represented by the following court-appointed counsel at trial and sentencing: Howard Wilson and John F. Simmons, 520 Adolphus Tower Building, Dallas, Texas, 75207.

On his appeal to the Texas Court of Criminal Appeals, Ernest Benjamin Smith was represented by John F. Simmons.

On his petition for a writ of certiorari in the United States Supreme Court, Ernest Benjamin Smith represented by John F. Simmons and by Jack Greenberg, James M. Nabrit III, Peggy C. Davis, Linda S. Greene and David E. Kendall, all at 10 Columbus Circle, New York, New York 10019, and Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305. In his state habeas corpus proceedings Ernest Benjamin Smith was represented by John F. Simmons and by Jack Greenberg, James M. Nabrit III, Peggy C. Davis, Joel Berger, Linda S. Greene and David E. Kendall, all at 10 Columbus Circle, New York, New York

10019, and Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305.

16. Ernest Benjamin Smith was not sentenced to more than one count of an indictment, or on more than one indictment in the same court and at the same time.

17. Ernest Benjamin Smith has no other sentence to serve in the State of Texas than the sentence which is challenged herein.

WHEREFORE, Petitioner prays that this Court:

1. Issues a writ of haveas corpus to have petitioner brought before it to the end that he may be discharged from his illegal confinement and restraint and/or relieved of his sentence of death;

2. Conduct a hearing at which proof may be offered concerning the allegations of this petition;

3. Permit petitioner, who is indigent, to proceed without prepayment of costs or fees;

4. Grant petitioner, who is indigent, sufficient funds to secure expert testimony necessary to prove the facts as alleged in this petition;

5. Grant petitioner the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts alleged in this petition.

6. Appoint an attorney to represent petitioner on the question of inadequate and ineffective assistance of counsel, as set forth in paragraph 12(F), above.

7. Allow petitioner a period of sixty days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

8. Stay petitioner's execution pending final disposition of this petition; and

9. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/ John F. Simmons
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ATTORNEYS FOR PETITIONER

Dated: April 21, 1977

Supreme Court, U. S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

VOLUME II

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

No. 79-1127

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

PETITION FOR CERTIORARI FILED
JANUARY 21, 1980
CERTIORARI GRANTED
MARCH 17, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	§	NO. CA3-77-0544
	§	
AND	§	
	§	
ELLIS UNIT, TEXAS DEPARTMENT OF CORRECTIONS	§	

ORDER - Filed April 22, 1977

The Petitioner, Ernest Benjamin Smith, is scheduled to be executed by electrocution by the respondent State of Texas on April 26, 1977. The Court has been presented with a motion to stay that execution pending a hearing on issues concerning the alleged unconstitutionality of petitioner's conviction and sentence.

For reasons hereinafter specified the motion for a stay is GRANTED pending further order of this Court.

The clerk of this Court is ordered to give immediate telephonic and telegraphic notice of this order staying Petitioner's execution to the following state officers:

(1) W. J. Estelle, Director of the Texas Department of Corrections;
(2) Robert Cousins, Warden Ellis Unit, Texas Department of Corrections;
(3) Eli Rushing, Assistant Warden Ellis Unit, Texas Department of Corrections;
(4) John L. Hill, Attorney General, State of Texas;
(5) Honorable Dolph Briscoe, Governor State of Texas; and,

(6) Paul Cromwell, Chairman Texas Board of Pardons and Paroles.

The clerk shall further cause a certified copy of this order to be served upon the above named individuals as soon as practicable. The clerk is further ordered to notify the Court in writing as to the exact time that the above named individuals have been contacted by telephone.

The stay is being granted incident to a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1970). The petition raises substantial questions concerning the constitutionality of the petitioner's conviction and sentence. Foremost among these concerns is the ability of the petitioner to present "mitigating circumstances" to the jury at the sentencing stage of the trial. Equally serious considerations are raised by the state's evidence of "aggravating circumstances" presented to the jury at the sentencing stage.

The Texas death penalty statute — Article 1257, V.A.P.C. and Article 37.071 V.A.C.C.P. — was held constitutional by the United States Supreme Court based on the finding that the jury may be permitted to consider mitigating factors. And "a jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas*, 49 L.Ed.2d 929, 938 (1976).

It is unclear at this stage whether the jury was properly presented with these mitigating factors. If the procedure for submitting these factors to the jury was unfair the death penalty imposed in this case is unconstitutional. As the Supreme Court has recently ruled a statute imposing the death penalty that is fair on its face may be applied in an unconstitutional manner. *Gardner v. Florida*, 45 U.S.L.W. 4275 (March 22, 1977).

Finally, the peculiar factual circumstances of this case raise serious questions concerning the death penalty imposed on petitioner. This concern stems from the fact that the murder upon which this conviction and death sentence is based was committed not by petitioner but

by one Howie Ray Robinson. The Texas Court of Criminal Appeals on April 20, 1977 overturned Robinson's state conviction. While this fact may not ultimately bear on the constitutional issues raised in this petition for habeas corpus the petitioner should at least be given the opportunity to explore the legal questions raised by the reversal of Robinson's conviction. Because of the short time span between the Court of Criminal Appeals reversal in *Robinson* and the scheduled date of execution that opportunity has not afforded itself.

Certain procedural matters must be ruled upon before a date for an evidentiary hearing on the petition for a writ of habeas corpus may be set by the court. Accordingly, a hearing to consider these procedural matters has been set for April 29, 1977, at 9:00 a.m.

It is so ORDERED.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

Date April 22, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, JR.	§	
DIRECTOR, TEXAS	§	
DEPARTMENT OF	§	No. CA 3-77-0544
CORRECTIONS, WARDEN	§	
ELLIS UNIT,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS	§	

ORDER - Filed April 29, 1977

The Court has raised several procedural matters with respect to the petition for writ of habeas corpus in the instant case. It is therefore ORDERED that:

(1) Attorney for Petitioner shall cause the summons and petition in this case to be served on the assistant Attorney General for the State of Texas, Walter C. Prentice, not later than 5:00 P.M., April 29, 1977. The marshal's fee for service shall be waived pending a determination of petitioner's status as a pauper.

(2) The state shall file an answer with the clerk of this court not later than May 20, 1977. The answer shall be in compliance with Rule 5 of the United States Rules for Habeas Corpus proceedings. 28 U.S.C. foll. §2254.

(3) The state shall file with the clerk of this court not later than May 20, 1977, the entire transcript from petitioner's state proceedings. If all or any part of this transcript is unavailable the court shall be notified as soon as practicable.

(4) The petitioner shall file with the clerk of this court not later than May 20, 1977 a report detailing with specificity the factual disputes in this case. 28 U.S.C. §2254(d). After this factual report is received the court will promptly determine whether an evidentiary hearing

is required.

(5) The petitioner, if he so desires, shall file a pauper's oath with the clerk of this court as soon as practicable. *Adkins v. E. I. duPont de Nemours & Co.*, 335 U.S. 331 (1948).

(6) If a pauper's oath is filed and the court allows in forma pauperis status, a list of expert witnesses the petitioner wishes to employ should be presented to the court for approval as soon as practicable.

It is so ORDERED.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

DATE April 29, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH, Petitioner	§ §	
V.	§ § §	CIVIL ACTION NO. CA3-77-0544-F
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent	§ § § § §	

MOTION TO DISMISS AND ANSWER -
Filed May 23, 1977

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent herein, and by and through his attorney of record, the Attorney General of Texas, files this Motion to Dismiss and Answer and would show the court as follows:

I.

Respondent has lawful custody of Petitioner pursuant to an indictment, judgment and sentence in Cause No. C-73-12659-IN of the 195th Judicial District Court of Dallas County, Texas. Copies of the indictment, judgment and sentence are attached hereto and made a part hereof.

Petitioner was indicted by the Grand Jury of Dallas County, Texas, for the capital murder of William Moon, alleged to have occurred on or about September 28, 1973.

The evidence showed that during the early morning hours of September 28, 1973, Petitioner, along with Howie Ray Robinson, entered a Sheppes Grocery Store in Dallas County, Texas. (R. 2671). Petitioner and Robinson entered the store, while George Holden waited out-

side in his car. (R. 2736). Both Petitioner and Robinson were carrying firearms. (R. 2737, 2738). Robinson placed a package of lunch meat and a jar of mustard on the counter while Petitioner held a gun on the cashier, William Moon, and said, "This is a holdup." (R. 2738). Moon apparently made a motion to reach for something, possibly his wallet (R. 2632, 2738). Petitioner attempted to shoot Moon but his gun misfired. (R. 2632, 2738). He shouted to Robinson either, "Get him Howie" (Petitioner's oral confession) (R. 2632) or, "Look out Howie" (Petitioner's trial testimony) (R. 2738). Robinson fatally shot the cashier. They took the money from the register at the store and a gun from underneath the counter and went to the home of James Mitchell where the proceeds of the robbery were divided.

The Texas Court of Criminal Appeals affirmed the conviction on February 18, 1976. Rehearing was denied by written opinion on July 14, 1976. Leave to File a Second Motion for Rehearing was denied on October 6, 1976. The mandate to the lower court was issued on October 8, 1976. Petitioner was formally sentenced to death on October 20, 1976, by the trial court. His execution date was set for November 22, 1976. A stay of execution pending timely filing of petition for writ of certiorari was granted by Mr. Justice Powell on November 6, 1976. On March 5, 1977, the Supreme Court of the United States denied the Petition for Writ of Certiorari. *Smith v. Texas*, 97 S.Ct. 1341 (1977). On March 22, 1977, Petitioner was again formally sentenced and the execution date set for April 26, 1977. On April 18, 1977, Petitioner presented a Writ of Habeas Corpus to the trial court. On April 20, 1977, Petitioner presented an Application for Stay of Execution to the Texas Court of Criminal Appeals. It was considered as an Original Writ of Habeas Corpus and denied in a written opinion on April 20, 1977.

Although Petitioner has not strictly complied with the provisions of Art. 11.07, Texas Code of Criminal Procedure, Respondent, in the interest of justice, does not contend that he has failed to exhaust state remedies.

Further, at this time, Respondent makes no contention that there has been an abuse of the writ.[1]

Jurisdiction appears to be proper under the provisions of 28 U.S.C. §2254.

II.

A.

Petitioner's Contention That His Death Sentence Constitutes Cruel And Unusual Punishment Is Without Merit.

Petitioner in eleven (11) numbered sections contends that his death sentence constitutes cruel and unusual punishment. The great portion of this contention consists of social arguments unsupported by facts or law in support of abolition of the death penalty.

As to Petitioner's sentence itself, this contention has been presented to both the Texas Court of Criminal Appeals, *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976), and the Supreme Court of the United States, *Smith v. Texas*, 97 S.Ct. 1341 (1977). It was rejected by both courts.

In upholding the Texas capital murder statute, the Supreme Court stated:

> "In the only other case in which the Texas Court of Criminal Appeals has upheld a death sentence, it focused on the question of whether any mitigating factors were present in the case. See *Smith v. State*, No. 49,809 (Feb. 18, 1976). In that case the state appellate court examined the sufficiency of the evidence to see if a 'yes' answer to question 2 should be sustained. In doing so it examined the defendant's prior conviction on narcotics charges, his subsequent failure to attempt to rehabilitate himself or obtain employment, the fact that he had not acted under duress or as a result of mental or emotional

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[1] *See*, Rule 9, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (effective February 1, 1977).

pressure, his apparent willingness to kill, his lack of remorse after the killing, and the conclusion of a psychiatrist that he had a sociopathic personality and that his patterns of conduct would be the same in the future as they had been in the past.

"Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objection consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Jurek v. Texas*, 428 U.S. 262 at 273.

The specific aggravating factors as to the offense were:

1. Murder - it is undisputed that the death of William Moon resulted from gunshots fired during the robbery.
2. Committed during the course of a robbery - it is undisputed that Petitioner was an active and knowing participant in the robbery.
3. Petitioner committed an act clearly dangerous to human life - it is a well established principle of law that the carrying of a deadly weapon supplies intent in murder or assault. Also Petitioner was aware that Robinson was carrying a deadly weapon and that there was a reasonable expectation that the course of conduct they embarked upon would result in the death of someone.

The specific aggravating factors for sentencing included the facts of the offense and the additional aggravating factors as outlined in the *Jurek* opinion of the Supreme Court of the United States.

Petitioner testified that he was a knowing and active participant in the robbery. He took the gun with him by

instinct. (R. 2786). The only defect in the gun was a broken clip, and he testified that it could be loaded manually, and further, that he knew how to load it manually. (R. 2750). His testimony that he did not own a gun (R. 2732) and that the gun he used in the instant offense was only in his possession for three days was severely impeached. His own witness testified that Petitioner took the gun at least three weeks prior to the offense (R. 2772) and that he had not seen Petitioner or the gun since. (R. 2773). Petitioner was also seen displaying a pistol in commercial establishments on two other occasions. (R. 2834, 2838).

The Petitioner had the opportunity to present mitigating evidence in his behalf. He testified that he had served with the military in Viet Nam and received an Honorable Discharge. (R. 2726). His step-mother testified that he went to school, went into the service, got an Honorable Discharge, and was married. (R. 2919). His aunt also testified to this. (R. 2921-2923). This meager evidence was far outweighed by the aggravating factors. Petitioner did not take the stand during the punishment trial to express any remorse. Had any psychiatric testimony favorable to him existed, he could have presented it for the jury's consideration. *See, Eddie Robinson v. State*, 548 S.W.2d 63 (Tex.Crim.App. 1977). There was no evidence that any extenuating pressures forced Petitioner's participation in the crime.

Further support for the proposition that punishment statutes calling for the prediction of future behavior are constitutional is the Federal Dangerous Special Offender Statute, 18 U.S.C. §3575, *et seq. See, United States v. Stewart*, 531 F.2d 326 (6th Cir. 1976), *cert. denied*, 96 S.Ct. 2629 (1976).

As to the portion of this allegation contending electrocution is an unnecessary, cruel means of execution, the Governor of the State of Texas signed House Bill 945 on May 4, 1977, providing for executions to be conducted by a lethal drug injection.

All of the other contentions of Petitioner as to cruel and unusual punishment have been rejected by *Gregg v.*

Georgia, 428 U.S. 153 (1966); *Proffitt v. Florida*, 428 U.S. 242; and *Jurek v. Texas, supra.* The people, acting through the Legislatures of several states, have chosen to provide for a death penalty. While Petitioner could cite authority for the social standards arguments he presents, equal authority exists for the proposition that the death penalty serves the legitimate interest of deterrence, retribution, incapacitation, and normative validation.[2]

Petitioner has wholly failed to state any facts which would require an evidentiary hearing or entitle him to relief. Therefore, the Motion to Dismiss should be granted.

B.

The Use Of Psychiatric Testimony Did Not Violate Petitioner's Fifth and Sixth Amendment Rights.

Petitioner contends that his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were violated by the use of the psychiatric evaluation performed prior to trial.

An eminently qualified psychiatrist testified as to the result of his examination. This mental status examination consisted of five sections. They were (1) general appearance and behavior; (2) production of thoughts; (3) affect or mood; (4) content of thought; and (5) sensorium. (R. 2937-2940). The statements made by Petitioner to the psychiatrist concerning the crime itself were elicited by Petitioner on cross-examination of the psychiatrist. (R. 2950). This medical testimony was presented after Petitioner had been found guilty.

Texas Code of Criminal Procedure, Art. 37.071, V.T.C.A. (1965), authorizes the presentation of evidence relevant to sentence. Psychiatric testimony favorable to

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[2] *See,* Ehrlich, *The Deterent Effect of Capital Punishment; A Question of Life and Death*, 65 Am.Econ.Rev. 397 (1975), which sets forth the conclusion that every execution deters approximately eight murders.

a defendant has been held admissible. *Robinson v. State, supra.*

The Fifth Amendment privilege against self-incrimination should not protect a defendant from disclosure of his mental status anymore than it protects a defendant from disclosure of his physical status. He may be compelled to give a blood test, fingerprints, or speak for a voice identification. *Schmerber v. California*, 384 U.S. 757 (1966).

It is difficult to perceive a violation of Fifth Amendment rights when such testimony is only to the evaluation of mental condition and is admitted only after a finding of guilt.

As to any Sixth Amendment right to have counsel present during the examination, it must be remembered that the examination is not an adversary or excusatory procedure. It is merely a physician's examination of the health of a defendant. There is no constitutional right to have a lawyer present during a physician's examination. Counsel for Petitioner was supplied with a report by this physician and was aware of the result of the examination.

No constitutional question has been raised by the admission of the results of the physician's examination during the punishment phase of the trial.

C.

Petitioner Was Not Denied Due Process By The Reference To His Having Carried A Pistol And His Nickname.

Petitioner contends he was denied due process by the introduction of evidence that he had possessed a pistol at times precedent and subsequent to the instant offense. He further contends that the use of this testimony was for the purpose of leading the jury to believe the Petitioner had committed other armed robberies. Such was not the case.

During the trial, the Petitioner testified that he had possessed the pistol used in the robbery for only three days and that a friend had brought it to him for repair.

(R. 2732). He further stated that he had never owned a pistol. (R. 2732).

After Petitioner rested, the State presented specific rebuttal evidence in response to Petitioner's testimony. Yolanda Lewis testified, out of the presence of the jury, that she had seen Petitioner carrying a pistol at Lowe's Bar-B-Q in Dallas, Texas, on September 29, 1973. (R. 2802-2805). This testimony was then presented to the jury. (R. 2836-2839). Martha White testified, out of the presence of the jury, that she had seen Petitioner carrying a pistol at Stop And Go in Dallas, Texas, on a Saturday during the first week of September, 1973. (R. 2829-2932). This testimony was also presented to the jury. (R. 2833-2836).

The references to Petitioner having carried a pistol similar to the one he carried in the instant offense, in public places at other times, were relevant to the issue of intent and were admissible for the purpose of impeaching Petitioner's testimony. They were clearly admissible under Texas law. *See, Spencer v. Texas*, 385 U.S. 564 (1967).

The reference to the nickname of "Dirty Red" was made in connection with the identification of Petitioner. That was the name by which some of the witnesses knew him, rather than the name of Ernest Benjamin Smith. (R. 2808-2809). Petitioner's own counsel referred to him as "Red" during cross-examination. (R. 2816).

These references did not prejudice Petitioner or deny him due process, especially in light of his own testimony of the brutal facts of the offense. This same contention has been presented to the Texas Court of Criminal Appeals where it was found to be without merit, and was further presented to the Supreme Court of the United States, in Petitioner's denied Petitioner for Writ of Certiorari.

D.

Petitioner's Oral Statement Which Led To The Gun Taken In The Robbery Was Admissible.

At the time Petitioner gave his oral confession, he had

been fully warned of his rights, both by a magistrate and the police officer to whom he made the confession. (R. 2645-2647, 2665-2666). Petitioner agreed in writing to the interview. (R. 2644). He did not exercise his right to remain silent. (R. 2665-2666). Petitioner's allegations in paragraph 8 of this section are untrue and not in the Record. The gun was known to belong to George Wheeler and was referred to as such. As a result of Petitioner's confession, Officer Lewis learned to whom Petitioner had sold the gun and was able to recover it.

An oral confession which leads to the discovery of evidence is admissible under Texas law. *McGlivery v. State*, 533 S.W.2d 24 (1976).

Having been fully warned of his rights and waiving them, Petitioner has no standing to complain of the admission of his confession.

E.

The Jury Was Qualified In Accordance With The Standards Set Forth In *Witherspoon v. Illinois*.

Petitioner sets forth several members of the venire he feels were improperly excused from the panel in violation of his constitutional rights as set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The jurors impermissibly excused in *Witherspoon* were summarily dismissed. A reading of the trial transcript in Petitioner's case affirmatively demonstrates that the challenged jurors were not summarily dismissed. Attorneys for Petitioner were given the opportunity to further question each and every challenged juror and did, in fact, avail themselves of such opportunity. Such was not the case in *Davis v. Georgia*, ____U.S.____, 97 S.Ct. 399 (1976), *Boulden v. Holman*, 394 U.S. 478 (1969), or *Maxwell v. Bishop*, 398 U.S. 262 (1970), all relied upon by Petitioner.

Not all of the excused jurors now complained of were challenged for opposition to the death penalty.[3] Several

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[3] Tommy F. Harrell wanted proof beyond any doubt as to guilt. (R.

of the prospective jurors answered that the knowledge that the ultimate sentence would be life imprisonment or death would affect their answers to questions of fact.[4] Others were excused by agreement for various reasons.[5] Finally, there were those prospective jurors who could not give the death penalty no matter what evidence was presented.[6]

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684); C. L. Christopher stated in response to defense questions that the possibility of parole would affect his deliberations on fact questions. (R. 1163-1166); Joe R. Duran wanted proof beyond any doubt on guilt. (R. 2429).

[4] Elodia Martinez could not find a person guilty knowing the possible punishment. (R. 178); Patricia D. Langham stated the punishment range would affect her determination of guilt (R. 489); Charles A. Nethery could not find a defendant guilty of capital murder (R. 694); Donald A. Kegley could not find a defendant guilty (R. 962); Kenneth Bishop stated the death penalty would affect fact determination (R. 1314); Janice Neal stated her answers would be affected by the possible penalty (R. 1425); Jerry Wayne Halpin could not find a principal guilty (R. 1730); Calvin M. Dennis could not convict (R. 1802); William M. Chitty stated the fact that he did not believe in the death penalty would affect his deliberations on fact questions (R. 1839); Gladys N. Hansen stated the possible punishment would affect her decision on guilt (R. 1848); Zena B. Bradshaw stated her answers would be affected by life or death (R. 1874); L. G. Smith could not find a principal guilty of capital murder (R. 2085); Edgar Dunn stated his feelings against the death penalty would affect his deliberations (R. 2235); Helen R. Coleman could not find a defendant guilty of capital murder (R. 2416); Jeanette Baldwin stated the penalty of life or death would affect her findings of fact (R. 2445-2446); Gary Lee Nelies could not take an oath that he would be unaffected as to any fact question knowing the possible punishment (R. 2497); Mrs. Ollie M. Arthur stated she could not take the oath (R. 2590); Robert L. Johnson stated he could not take the oath (R. 2409); C. W. Jones stated the death penalty would affect his deliberations on fact questions (R. 1804).

[5] Mary J. Page (R. 377); Robert M. Hill (R. 1107); Beverly H. Rands (R. 1137); Jerry L. Williams (R. 2231).

[6] Stanley T. Tanner opposed the death penalty under any circumstances (R. 848); Laura Nicholas believed everyone has a right to

The Supreme Court stated in *Witherspoon v. Illinois, supra, footnote 21*, that:

> "... [N]othing we say today bears upon the power of a State to execute a defendant sentence to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) that they could automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case."

All of the prospective jurors in question were properly excluded. The oath required by Art. 1257, Texas Penal Code, was in part a codification of the *Witherspoon* doctrine. For the state to allow a person to serve on a capital jury knowing that he would ever answer fact questions in a manner to coincide with his personal beliefs or prejudices, either for or against the death penalty, would be to sanction trial by prejudice, rather than trial by evidence.

The Texas Court of Criminal Appeals found that all of the prospective jurors, with the exception of veniremen Baker and Switch, were tested in accordance with the terms of Art. 1257, Texas Penal Code. *See, Smith v. State, supra*, at 698. They were both excused, with the consent of the Petitioner's counsel, after stating they

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live no matter what he has done (R. 1337); Grisley Baker felt his religion would prevent him from serving in a capital case (R. 1691); Gary L. Barclay could not, under any circumstances, give the death penalty to a principal (R. 1912); Melpherd D. Switch could not condemn anyone to death (R. 1957); Elijah R. Robinson, Jr. opposed the death penalty under any circumstances (R. 2226); Johnnie Mae Sanders was unequivocally opposed to the death penalty (R. 2592); Jimmy S. Christian could not vote for the death penalty under any circumstances (R. 2145).

could not give the death penalty.[7] This portion of the voir dire examination of Petitioner's case bears no kindredship to the examination of venireman Lamb in *Davis v. State*, ____ Ga. ____, 225 S.E.2d 241, 243 (Ga.), *rev'd*, ____U.S.____, 97 S.Ct. 339 (1976), which the Georgia Supreme Court found violative of *Witherspoon*. Unlike the Georgia Supreme Court, the Texas appellate court made a careful determination that *Witherspoon* had been followed.

There was no error in the jury selection procedure employed during Petitioner's trial.

F.
Petitioner Received Effective Assistance Of Counsel.

The trial record amply demonstrates that Petitioner received the effective assistance of counsel. No germane fact of that record is alleged which demonstrates that counsel's trial performance denied Petitioner his Sixth and Fourteenth Amendment rights. The fact that counsel may have not objected to the excusal of certain prospective jurors is of little importance when it is clear

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[7] Baker testified as follows:

Q. . . . Are you saying your religion would prevent you from personally being on a death case?

A. Yeah.

THE COURT: Any Objections?

MR. SIMMONS: I have no objections.

(R. 1691)

* * *

Switch testified as follows:

A. Well, sir, I work in a hospital. This is my profession, and therefore, in my belief, I'm not able to prejudge anybody. Death is something I would not be able to condemn anybody to. This is what I believe and therefore—

Q. Because of your profession?

A. Yes.

Q. And because of the—

MR. SIMMONS: We have no objection to him being excused, if the State—

(R. 1957)

from the record that such objection would not have been sustained. There was no prospective juror who was improperly excused.

A defendant is not entitled to perfect counsel, but rather "reasonably effective assistance" of counsel. *Herring v. Estelle*, 491 F.2d 125 (6th Cir. 1975). As set forth in *McKenna v. Ellis*, 280 F.2d 592, 599 (6th Cir. 1960), effective counsel is:

> ". . . not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

Counsel for Petitioner filed numerous pre-trial motions, including a Motion for Severance (R. 10), Motion for Discovery (R. 12), Motion for Production of Witness Statements (R. 16), Motion to Sequester Jury (R. 19), Motion to List State Witnesses (R. 21), Motions in Limine (R. 26, 29, 31, 33, 41, 64), Motion to Suppress (R. 67), Motion to Eliminate Consideration of Death Penalty (R. 69). Counsel for Petitioner also requested Special Instructions (R. 93-103), made Objections to the Court's Charge (R. 105), made a Motion for New Trial (R. 125), gave Notice of Appeal, presented a Brief to the Texas Court of Criminal Appeals, and presented oral argument on behalf of Petitioner. During the trial itself, counsel made numerous objections and conducted a vigorous cross-examination of prosecution witnesses. In viewing the Record as a whole, there is no evidence of ineffective assistance of counsel.

III.

Respondent denies each and every allegation of fact made by the Petitioner except those specifically admitted herein or those supported by the Record. Petitioner has not set forth any facts which would show that he is entitled to relief or an evidentiary hearing.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Re-

spondent prays that this Motion to Dismiss be granted, or in the alternative, that after final hearing, relief be in all things denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

/s/ Anita Ashton
ANITA ASHTON
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
Telephone: (512) 475-3281

Attorneys for Respondent

Letter From Counsel for Petitioner To United States District Court

August 25, 1977

Hon. Robert W. Porter
Northern District of Texas
1100 Commerce Street
Dallas, Texas 75202

Re: *Smith* v. *Estelle*
Civil Action No. CA3-77-0599-F

Your Honor:

This letter is submitted in response to the Court's order in the above-titled case requiring petitioner to delineate which issues involve factual disputes and which may be decided without the need for an evidentiary hearing.

The main thrust of the petition, contained in Paragraph 12(A), is that the Texas death penalty statute is unconstitutional as applied. Proof on this issue would entail a substantial evidentiary hearing, including testimony as to the latest scientific evidence on the issue of deterrence and statistical evidence as to the race and economic status of those who are sentenced to die in Texas as opposed to those who commit potentially capital offenses but are not sentenced to die. The hearing would also involve testimony by psychiatrists, including representatives of the American Psychiatric Association, questioning the reliability of the testimony of Dr. Grigson introduced by the State as proof of aggravating circumstances. In addition, petitioner's allegation in paragraph 12E(3) as to the conviction-proneness of the jury at his trial requires testimony from several social scientists who have conducted extensive studies of the attitudes of jurors favoring capital punishment. Finally, petitioner's allegation in paragraph 12D concerning the inadmissibility of the oral statement given to a police officer by petitioner raises a factual question for resolution at a hearing.

Nonetheless, petitioner believes that there are several significant issues in this case which can be decided in his

favor on the basis of a motion for summary judgment, without the need for a hearing:

1) Paragraph 12E of the petition includes allegations that persons with conscientious scruples against the death peanlty were improperly excluded from the jury, in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). This is purely an issue of law which can be briefed and decided on papers.

2) Paragraph 12C alleges that the prosecuting attorney made persistent, immaterial, improper references to and suggestions of unrelated criminal activity by petitioner, at both the guilt and sentencing phases of petitioner's trial. These statements of the prosecuting attorney are all recorded in the transcript of the trial, and there is no factual dispute that they were uttered. Accordingly, this issue can be decided without an evidentiary hearing.

3) Paragraph 12B of the petition includes an allegation that the introduction of Dr. Grigson's testimony at trial violated petitioner's privilege against self-incrimination and his right to counsel. Respondent's Answer, pp. 6-7, does not dispute that 1) permission of petitioner's counsel was not obtained prior to Dr. Grigson's interview of petitioner; 2) petitioner's counsel was not notified of the interview; and 3) petitioner was not warned that a) his statements to Dr. Grigson could be used against him at trial, b) he had the right to have counsel present and/or to consult with counsel during the interview, c) he had a right to remain silent and d) he had a right to terminate the interview at any time. Also, the trial transcript reflects that Dr. Grigson testified not only as to petitioner's mental state but as to statements by petitioner about facts of the crime itself [see paragraph 12(B)(13)]. These facts raise clear questions of constitutional law under the Fifth and Sixth Amendments.

4) Paragraphs 12(A)(2) and (3) raise a substantial legal question concerning limitations on petitioner's ability to present evidence of mitigating circumstances at the penalty trial, because his case was tried prior to the holding

of the Texas Court of Criminal Appeals that a broad range of mitigating factors were admissible under the Texas death penalty statute. *Jurek* v. *State*, 522 S.W.2d 934, 939-40 (Tex.Cr.App. 1975). As there can be no dispute that petitioner was tried prior to the *Jurek* decision, this issue also can be decided in his favor without an evidentiary hearing.

5) Finally, petitioner alleges in paragraphs 12(A)(1) and (5) that the death penalty is disproportionately severe and therefore excessive in the case of an offender who did not himself take human life. While the petition contains many factual allegations on this issue concerning, e.g., public attitudes towards use of the death penalty for non-triggermen, the extremely rare use of the death penalty in such cases, and the lack of deterrent effect of this application of the death penalty, we believe that the issue can and should be decided in petitioner's favor as a matter of law. Indeed, the Supreme Court of the United States has granted certiorari in an Ohio case presenting just such an issue of law, and will have the question before it this Term. *Bell* v. *Ohio*, No. 76-6513 (certiorari granted June 27, 1977). Enclosed for this Court's interest is a xerox copy of the Brief for Petitioner in *Bell*, setting forth (in Point I(c) and Appendix A) the legal arguments now before the Court on the non-triggerman issue. (The brief is presently being printed, and a printed copy will be submitted to Your Honor as soon as it is received.)

Respectfully yours,
/s/ Joel Berger
JOEL BERGER

JB/mi
Enc.
cc: Hon. John L. Hill
John Simmons, Esq.
Anthony G. Amsterdam, Esq.

United States District Court
Northern District of Dallas
Dallas, Texas 75242
October 6, 1977
Robert W. Porter
U. S. District Judge

Mr. John F. Simmons
520 Adolphus Tower Bldg.
1412 Main at Akard St.
Dallas, Texas

Re: No. CA3-77-0544-F
Ernest Benjamin Smith
vs. W. J. Estelle, et al

Dear Mr. Simmons:

In reviewing the record in the above referenced case, I have determined that there are certain facts that are not of record and could be supplied by you and your co-counsel, Mr. Wilson, by affidavit.

Specifically, I would like your personal knowledge in the following areas:

(1) What procedures were used to appoint Dr. Grigson to examine Mr. Smith;

(2) Were you or Mr. Wilson notified of this appointment;

(3) Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of his competency to stand trial;

(4) To your knowledge was a written order entered by the court appointing Dr. Grigson;

(5) What was your understanding as to the purpose of Dr. Grigson's appointment;

(6) When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith;

(7) Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the Court summarizing his findings?

I would like this information filed with the Court not later than October 14, 1977 and I trust you will have less difficulty with this than you had in meeting the last

deadline set by the Court concerning the matters that required a hearing in this case.

Miss Ashton is directed by copy of this letter to prepare controverting affidavits, if she determines them appropriate and file them with the Court not later than October 21, 1977.

Yours very truly,
/s/ Robert W. Porter
Robert W. Porter

RWP:dh
cc: Miss Anita Ashton
P.O. Box 12548
Capitol Station
Austin, Texas 78711

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR.,	§	
DIRECTOR,	§	
TEXAS DEPARTMENT	§	NO. CA3-77-0544-F
OF CORRECTIONS,	§	
AND	§	
	§	
_____ WARDEN	§	
ELLIS UNIT,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS,	§	
	§	
Respondents.	§	

AFFIDAVIT IN QUESTION-AND-ANSWER FORM - Filed October 12, 1977

(1) Q. What procedures were used to appoint Dr. Grigson to examine Mr. Smith?

A. I have no idea. Probably no appointment was ever made. Most likely, either Judge Scales or Asst. D.A. Doug Mulder just told Dr. Grigson to go interview Ernest Smith.

(2) Q. Were you or Mr. Wilson notified of this appointment.

A. No. Neither of us were ever notified.

(3) Q. Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of competency to stand trial;

A. No. Neither of us did. The answer is no to both

parts of the question.

(4) Q. To your knowledge was a written order entered by the court appointing Dr. Grigson:

A. No.

(5) Q. What was your understanding as to the purpose of Dr. Grigson's appointment;

A. If there was an appointment made I was never aware of it. When I accidentally saw the letter from Dr. Grigson in the Court's file, I just presumed that Judge Scales had asked Dr. Grigson to examine Ernest Smith informally to be certain in his own mind that Ernest was competent to stand trial.

(6) Q. When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith;

A. Sometime during jury selection we discovered Dr. Grigson's letter in the file summarizing his findings.

(7) Q. Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the Court summarizing his findings?

A. No. I feel sure there was never any written report. But regardless, we were never furnished with a copy of either.

I, JOHN F. SIMMONS, do solemnly swear that the foregoing answers to the questions set out herein, are true and correct.

/s/ John F. Simmons
JOHN F. SIMMONS
ATTORNEY FOR PETITIONER

JURAT

SUBSCRIBED AND SWORN to before me by the said JOHN F. SIMMONS who appeared before me on this the _____ day of October, 1977, and after being sworn by me to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
Notary Public in and for
Dallas County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR.,	§	
DIRECTOR,	§	
TEXAS DEPARTMENT	§	NO.CA-77-0544
OF CORRECTIONS,	§	
AND	§	
	§	
_____ WARDEN	§	
ELLIS UNIT,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS,	§	
	§	
Respondents.	§	

AFFIDAVIT - Filed October 12, 1977

My name is John F. Simmons. I am a practicing attorney in Dallas County. I am and have been the Attorney for Ernest Benjamin Smith since November 5, 1973.

This Affidavit is relative to the question of Dr. James Grigson's examination of Ernest Smith and his subsequent testimony.

I have no idea what procedures were used to appoint Dr. Grigson to examine Mr. Smith.

I was unaware that Judge Scales had appointed Dr. Grigson to see my client if he did make such an appointment. Dr. Grigson never told me about it. Neither he nor the State nor the Court ever told me about it, gave me a copy of a letter or a report, or did anything to suggest Dr. Grigson had visited with my client.

To my knowledge no written order was ever made.

Some time after the beginning of jury *voir dire* exam-

ination, Mr. Wilson and I were looking through the Court's file and saw the letter to Judge Scales from Dr. Grigson dated Feb. 28, 1974, pertaining to Dr. Grigson's "Mental evaluation" of Ernest. Although I had not known of the letter or the visit before seeing the letter in the file, I attached no significance to it. From the contents of the letter I just assumed that Judge Scales wanted to be satisfied in his own mind that the defendant was competent to stand trial. He had never asked me that question but if he had I would have answered it affirmatively. Ernest had never had any mental problems and was above average intelligence in my opinion.

Neither the issue of insanity nor the question of competency to stand trial was ever mentioned during my representation of Ernest Benjamin Smith. No Motions were ever made in that regard. No prospective juror was questioned or qualified regarding same, nor did we present anything during the guilt phase that raised the issue.

Until the time that Dr. Grigson took the stand nothing had been done or said that ever gave me any reason to believe Dr. Grigson would be called to testify, or that there was anything material or relevant that he could testify to.

Neither Mr. Wilson nor myself were ever notified of this "appointment." We were not advised beforehand that the visit would be made. We were not advised afterwards that the visit had been made.

Neither Mr. Wilson nor myself were ever furnished with a copy of any report or a copy of the letter to the court summarizing Dr. Grigson's findings. I have never seen any other report than the letter.

I swear under oath that the foregoing statements in this Affidavit are true and correct.

/s/ John F. Simmons
JOHN F. SIMMONS
ATTORNEY FOR PETITIONER
ERNEST BENJAMIN SMITH

JURAT

SUBSCRIBED AND SWORN to before me by the said JOHN F. SIMMONS who appeared before me on this the 12th day of October, 1977, and after being sworn by me to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
Notary Public in and for
Dallas County, Texas

CERTIFICATE OF SERVICE

I do certify that true copies of this Affidavit, the question-and-answer form Affidavit, and the Affidavit signed by Howard G. Wilson, have all been sent this date by Registered mail, return receipt requested, to Miss Anita Ashton, Assistant Attorney General, and Hon. Henry Wade, District Atty. of Dallas County, Texas.

/s/ John F. Simmons
JOHN F. SIMMONS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, AND	§	NO. CA3-77-0544
	§	
_____ WARDEN ELLIS UNIT, TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
Respondents.	§	

AFFIDAVIT - Filed October 12, 1977

My name is Howard G. Wilson, I graduated from the S.M.U. School of Law in 1960 and have been a practicing attorney ever since.

I do not know what procedures were used to appoint Dr. Grigson to examine Mr. Smith. I don't really think an appointment as such was ever made. Regardless neither Mr. Simmons nor myself were ever notified of any such appointment.

Neither Mr. Simmons nor myself ever gave any type notice that either Mr. Smith's sanity or his competency to stand trial would ever be an issue in the case. We never at any time even suggested that Ernest was anything other than sane and mentally competent.

To my knowledge no written Order was entered by the Court appointing Dr. Grigson. I have never seen one.

If Dr. Grigson was appointed, I have no understand-

ing as to what the purpose for it was. We had never made any suggestion of insanity and/or incompetency.

I am not sure of the exact time that I became aware Dr. Grigson had examined Mr. Smith. It was after the start of jury selection. We were reviewing the file and saw a letter from Dr. Grigson to Judge Scales. We asked Ernest about it and he said yes, that a doctor had been up to see him. He said the doctor stayed about forty minutes.

Neither of us attached any significance to the visit. From the tenor of the letter it just seemed like something for the judge's own personal information.

Neither Mr. Simmons nor myself were ever furnished with a copy of a report of any findings that Dr. Grigson made or a copy of his letter to the court.

/s/ Howard G. Wilson
HOWARD G. WILSON

JURAT

SUBSCRIBED AND SWORN TO before me by the said HOWARD G. WILSON who appeared before me on this the _____ day of October, 1977, and after being sworn by me to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
Notary Public in and for
Dallas County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH, PETITIONER	§	
VS.	§	CAUSE NO. CA3-77-0544
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., RESPONDENTS	§	

AFFIDAVIT - Filed October 21, 1977

I, the undersigned Affiant, being duly sworn, on oath make the following statement:

My name is R. T. Scales and I am the Judge of the 195th Judicial District Court of Dallas County, Texas. I was the presiding judge at the trial of The State of Texas versus Ernest Benjamin Smith in Cause Number C73-12659. Certain questions (set out below) have been given to me by the Texas Attorney General and answers have been requested. Such questions were originally submitted to the defense attorneys, John F. Simmons and Howard G. Wilson, for their response. I have read such questions and have been requested by the Texas Attorney General to provide any information regarding answers to such questions. My responses are, as follows:

(1) Q. What procedures were used to appoint Dr. Grigson to examine Mr. Smith?

A. I appointed the psychiatrist Dr. Grigson to examine the defendant Ernest Benjamin Smith. In all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial. I have done this for my benefit because I do not intend to be a participant in a case where the defendant receives the death penalty and his mental competency remains in doubt.

(2) Q. Were you or Mr. Wilson notified of his appointment?

A. As best I recall, I informed John Simmons, the attorney for the defendant, that I had appointed Dr. Grigson to examine the defendant and that a written report was to be mailed to me.

(3) Q. Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of his competency to stand trial?

A. I do not recall that such notice of insanity or incompetency was ever given by either attorney. I have examined the court records and no such written notice appears in such records.

(4) Q. To your knowledge was a written order entered by the court appointing Dr. Grigson?

A. As I recall, Dr. Grigson was appointed by oral communication. A letter of appointment was not prepared and the court records do not reflect that I entered a written order.

(5) Q. What was your understanding as to the purpose of Dr. Grigson's appointment?

A. See my answer to question No. 1.

(6) Q. When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith?

A. See my response to question No. 2.

(7) Q. Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the court summarizing his findings?

A. I received a letter, dated 23 February 1974, from Dr. Grigson which stated that he had examined the defendant on 13 February 1974. Such letter summarized Dr. Grigson's findings. Such letter was placed in the court records and was thereby made available to both the defense and the State. To my knowledge, no written report was ever prepared by Dr. Grigson.

I, the undersigned Affiant, do solemnly swear that the foregoing answers to the questions set out herein, are true and correct.

/s/ R. T. Scales
R. T. SCALES
JUDGE OF THE 195TH
JUDICIAL DISTRICT
COURT OF DALLAS
COUNTY, TEXAS

JURAT

SUBSCRIBED AND SWORN to before me by the said R. T. Scales, who appeared before me on this the 21st day of October, 1977, and after being sworn by to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
NOTARY PUBLIC IN AND FOR
DALLAS COUNTY, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Affidavit has been served on John F. Simmons, 520 Adolphus Tower Building, 1412 Main at Akard Street, Dallas, Texas, Attorney for the Petitioner, by depositing same in the United States Mail, Postage Prepaid, on this the 21st day of October, 1977.

/s/
JOHN HAGLER

Letter From Counsel for Petitioner to United States District Court

December 21, 1977

Hon. Robert Porter
United States District Judge
United States Courthouse
1100 Commerce St., Room 15-C22
Dallas, Texas 75202

Re: Ernest Benjamin Smith
Vs. W. J. Estelle,
Cause No. CA 3-77-0544-F

Dear Judge Porter,

Pursuant to my conversation with Mr. Chip Babcock of court I am furnishing herewith an Affidavit as to information requested.

By copy of this letter I am furnishing a sworn copy of the Affidavit to Miss Cathy Fry, Assistant Attorney General, by hand-carrying same to her this date.

Very truly yours,
/s/
JOHN F. SIMMONS
ATTORNEY-AT-LAW

JFS/bs
Enclosure

CC:
Miss Anita Ashton
John H. Hagler
Joel Berger, Legal Defense Fund

IN THE UNITED STATES
DISTRICT COURT FOR
THE NORTHERN DISTRICT
OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, JR.	§	NO. CA 3-0544-F
DIRECTOR, TEXAS	§	
DEPARTMENT OF	§	
CORRECTIONS,	§	
WARDEN ELLIS UNIT,	§	
TEXAS DEPARTMENT OF	§	
CORRECTIONS	§	

AFFIDAVIT - Filed December 21, 1977

I, JOHN F. SIMMONS, do solemnly swear that the foregoing facts are true and correct:

I am the Attorney for Ernest Benjamin Smith, Petitioner in the above styled and numbered cause. On April 21, 1977 I filed in this court in this cause, a Petition for Writ of Habeas Corpus on behalf of Mr. Smith.

In this petition I raised, among other points, the following issues:

"That the introduction of the testimony of (psychiatrist) Dr. James Grigson at Petitioner's trial violated his privilege against self-incrimination and his rights to fair notice and effective assistance of counsel." This issue was raised because (among other reasons), (1) Dr. Grigson at no time told Petitioner that he had a right to remain silent, and (2) Dr. Grigson at no time told Petitioner that he had a right to have an attorney present, or to consult with an attorney.

At the time the State presented Dr. Grigson's testimony to the jury I did not make those *specific* objections to his testimony. His appearance at the trial was a complete surprise to me. I asked for a hearing outside

the presence of the jury and attempted to explore the reasons why Dr. Grigson had gone to see my client, who had sent him, etc. I then made a general objection to his testimony prior to his testifying in front of the jury. This objection was based on all the matters brought out in the just-completed hearing, primarily that the State was presenting him without listing his name as a witness before trial in violation of a Motion, granted by the Court, in which his name should have been listed as a witness.

I did not make the specific objections raised in this Habeas Petition because so far as I knew at the time this had been a routine psychiatric examination by a court-appointed psychiatrist to determine the defendant's competency to stand trial. I was certain in my own mind, as was my co-counsel, that a defendant had no guaranteed right under Texas law to have an attorney present at such an interview, or that he should be advised he could remain silent. At the time the *Ernest Benjamin Smith* case was tried, there was no Texas authority on the point. The Court of Criminal Appeals has since held that a defendant is guaranteed no such rights under Texas law.

In my application for Writ of Habeas Corpus filed in Judge R. T. Scales (trial) Court I raised these issues of Due Process. Judge Scales denied the application without a hearing. I raised the same issues in my application for Habeas relief before the Texas Court of Criminal Appeals. This also was denied without hearing.

Because the law in Texas did not recognize the right of a defendant to have an attorney present at a competency interview with a psychiatrist, I felt a more appropriate objection to Dr. Grigson's testimony was the one I gave.

At the time I was surprised that there could be anything Dr. Grigson could testify to on punishment that would be germane to the issues. I certainly had no suggestion that the State intended to use Dr. Grigson's testimony as a basis for sending Ernest Benjamin Smith to the Electric chair.

/s/ John F. Simmons
JOHN F. SIMMONS
Attorney for Petitioner

JURAT

Before me, Bonnie Spencer, a Notary Public in and for Dallas County, Texas, appeared John F. Simmons, and after being duly sworn by me on this the 21st day of December, 1977, John F. Simmons declared to me that the matters contained in the above Affidavit are true, and that he has affixed his name to same.

/s/ Bonnie Spencer
Bonnie Spencer, Notary Public
In and for Dallas County, Texas

CERTIFICATE OF SERVICE

I, JOHN F. SIMMONS, do hereby certify that I have this date served a sworn copy of this Affidavit on Miss Cathy Fry, Assistant Attorney General, by hand-delivering same to her at her offices, second floor, M-K-T Building, corner Commerce and Market Sts., Dallas, Texas, 75202, this the 21st day of December, 1977.

/s/ John F. Simmons
JOHN F. SIMMONS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Ernest Benjamin SMITH

v.

W. J. ESTELLE, Jr., Director,
Texas Department of Correction, and Warden,
Ellis Unit, Texas Department of Corrections.

No. CA3-77-0544-F.

Dec. 30, 1977.

New Trial Denied March 27, 1978.

John F. Simmons, Dallas, Tex., Joel Berger, New York City, Anthony G. Amsterdam, Stanford, Cal., for petitioner.

Joe B. Dibrell, Jr., Asst. Atty. Gen., Chief, Enforcement Div., Anita Ashton, Asst. Atty. Gen., Austin, Tex., for respondents.

MEMORANDUM OPINION

ROBERT W. PORTER, District Judge.

During the early morning hours of September 28, 1973, Ernest Benjamin Smith and Howie Ray Robinson entered a Schepps Grocery in Dallas County, Texas, intending to rob the store. Robinson placed a package of lunch meat and a jar of mustard on the counter while Smith held a gun on the cashier and said "This is a holdup." The cashier moved suddenly as if to reach for something and Smith yelled either "Get him Howie" or "Look out Howie." Robinson then fatally shot the cashier. Smith and Robinson removed the money from the register and a gun from underneath the counter and left for the home of a friend where they divided the money.

Robinson and Smith were apprehended and charged with the offense of murder with malice aforethought in

the course of a robbery. Judge R. T. Scales of the 195th Judicial District Court of Dallas County appointed John Simmons to represent Smith and, one year later, appointed attorney Howard G. Wilson to assist Mr. Simmons. A motion to sever Smith's case from his co-defendants' was granted.

Robinson's case went to trial and he was convicted. However, on April 20, 1977, this conviction was overturned by the Texas Court of Criminal Appeals which held that admission of testimony that a state's witness had taken and passed a lie detector test was reversible error. *Robinson v. State*, 550 S.W.2d 54 (Tex.Cr.App. 1977). Robinson was retried and again convicted. On December 2, 1977, however, Texas District Court Judge Richa[illegible]ays granted Robinson a new trial and the case is currently pending. *State of Texas v. Howie Ray Robinson*, No. C-74-3195-PNQ.

In the Smith case the grand jury returned a bill of indictment on December 28, 1973 and the state gave notice that it intended to seek the death penalty. Some time prior to February 18, 1974, Judge Scales instructed the state's attorney Doug Mulder to arrange a psychiatric examination of Smith by Dr. James P. Grigson, a psychiatrist.[1] Dr. Grigson was asked to determine whether Smith was competent to stand trial.

"In all cases where the State has sought the death penalty," Judge Scales testified in this proceeding, "I have ordered a mental evaluation of the Defendant to determine his competency to stand trial. I have done this for my benefit because I do not intend to be a participant in a case where the Defendant receives the death penalty and his mental competency remains in doubt."

Dr. Grigson visited Smith on February 18, 1974 and after a ninety minute examination concluded that the defendant was competent to stand trial. In a letter to Judge Scales Dr. Grigson wrote: "It is my opinion that Ernest Benjamin Smith, Jr. is aware of the difference

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[1] Statement of Facts. *State v. Smith* (hereinafter cited as "Record") Vol. VI at 2929. [I will refer to the numbers on the bottom of the pages in the record. A different set of numbers appears at the top of each page.]

between right and wrong and is able to aid an attorney in his defense." This conclusion approximates the test for competency.[2] Dr. Grigson's letter was filed among the court papers.

This competency evaluation was ordered even though Mr. Simmons and Mr. Wilson had not put into question Smith's competency to stand trial or the related psychiatric issue of Smith's sanity at the time of the offense. Judge Scales' practice of ordering competency hearings in death penalty cases, however, cannot be faulted in the least even when the issue has not been previously raised. The Court has authority to protect the integrity of the judicial system by making certain only mentally competent defendants stand trial.

It is also Judge Scales' practice to notify defense counsel that the psychiatric examination will be conducted. However, inexplicably in this case that notification was never received by either Mr. Simmons or Mr. Wilson. No formal order of appointment was entered and possibly due to the heavy workload of the Court, less formal notification was not accomplished. Dr. Grigson never filed a written report of his evaluation[3] but did send a letter summary of his conclusions to Judge

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[2] *See Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

[3] This failure to file a written report of the examination would violate Art. 46.02 § 3(d) of the Texas Code of Criminal Procedure which was amended after Smith's trial. The section provides:

> A written report of the examination shall be submitted to the court within 30 days of the order of examination, and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney. The report shall include a description of the procedures used in the examination, the examiner's observations and findings pertaining to the defendant's competency to stand trial, and recommended treatment. If the examiner concludes that the defendant is incompetent to stand trial, the report shall include the examiner's observations and findings about whether there is a substantial probability that the defendant will attain the competence to stand trial in the foreseeable future.

Scales. Again, through some mixup, Mr. Simmons and Mr. Wilson never received a copy of this letter and first discovered it while reviewing the court papers after picking the jury in Smith's trial which commenced on March 11, 1974. This was their first notice that a psychiatrist had been appointed and had examined the defendant. Mr. Simmons testified that "although I had not known of the letter or the visit before seeing the letter in the file, I attached no significance to it. From the contents of the letter I just assumed that Judge Scales wanted to be satisfied in his own mind that the defendant was competent to stand trial. He had never asked me that question but if he had I would have answered affirmatively. Ernest had never had any mental problems and was above average intelligence in my opinion."

Logically Dr. Grigson's appointment should not have concerned Mr. Simmons. A motion to discover the state's list of witnesses had been granted and Dr. Grigson's name did not appear. There was therefore no danger that possibly incriminating statements made by Smith to Dr. Grigson would be used at the guilt or innocence stage of the trial. There was also no reason to believe Dr. Grigson would be used at the punishment stage. The question of competency or sanity had never been raised, no prospective juror was questioned on this issue and absolutely no evidence at the guilt or punishment stage was introduced by the defense as to Smith's competency, sanity or any other potential personality disorder.

The capital murder trial in Texas is held in two stages. In the first stage the jury determines whether the defendant is guilty or innocent of the offense. The jury found Smith guilty as alleged in the indictment. Once guilt has been established the trial moves into the punishment phase. After hearing evidence in this proceeding, the jury must determine on the basis of all the evidence it has heard whether the Defendant should be put to death or given a life sentence. The death penalty may be imposed only if the jury answers "yes" to each of three

special issues submitted to it.[4]

The state has the burden of proving beyond a reasonable doubt that these answers should be "yes." If the state fails in its proof or if the jury answers "no" on any one of these three issues the death penalty may not be imposed.[5] Because the state has the burden of proof it introduces testimony first in the punishment proceeding followed by the defense.

In this case, however, the state took the unusual step of resting subject to reopening.[6] Judge Scales permitted

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[4] The special issues—as provided in Art. 37.071(b) of the Texas Code of Criminal Procedure Supp. 1976-77 read:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

[5] Jurek v. State of Texas, 428 U.S. 262, 269, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

[6] The Court: As I understand it, Mr. Mulder, you are going to rest—how do you want to word it? Subject to the right to reopen?

Mr. Mulder: Whatever your pleasure is. However, I don't think they're going to know one way or the other. We can do it right now. They can come in, and the Defense and be calling witnesses?

The Court: Mr. Simmons?

Mr. Simmons: I didn't understand.

The Court: He doesn't have any testimony right now, but will have.

Mr. Mulder: We will rest right now in the record.

The Court: Subject to your right to reopen if they don't put on any testimony?

Mr. Tokoly: I think since we are permitting them to go first, if they can start putting on their testimony as if that's the normal thing to do, then we will put on our testimony after theirs.

The Court: That's fine. Since the state has the right to go

this procedure after making clear on the record that the state had the right to go first.

Mr. Simmons called three witnesses, one of whom testified, in effect, that Smith's gun was broken and would not fire on the night of the robbery. Smith's step-mother, the second witness, testified that the defendant had graduated from high school, that he was a truthful person and that he had received an honorable discharge from the military service. Smith's aunt, the third witness, corroborated the step-mother's testimony. The defense rested. Mr. Mulder then announced his intention to call Dr. Grigson. Mr. Simmons objected and this objection was overruled. When this occurred Mr. Simmons asked that the prosecution not be permitted to tell the jury that Dr. Grigson was appointed by the court. Judge Scales initially granted this motion but, after hearing additional argument from Mr. Mulder, reversed his ruling. The jury was informed that Dr. Grigson was the court appointed psychiatrist. They were not told he was appointed for the sole purpose of determining Smith's competency to stand trial. Mr. Simmons was permitted to take Dr. Grigson on *voir dire* out of the presence of the jury and it was established that Mr. Mulder had contacted Dr. Grigson the previous Thursday and said that his testimony would be needed in the Smith case. Dr. Grigson, who does much court related work,[7] responded that he would be available when

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first,I wanted to show something in the record concerning you resting at this time.

Mulder: That's fine, Judge, with that understanding.

Record at 2910-11.

[7] Dr. Grigson testified that at the time of the trial he had been in full time private practice for about six years and six months. Record at 2933. He had examined almost 8,000 persons charged with criminal offenses and had testified several hundred times in court. For appellant cases where Dr. Grigson's testimony has been at issue see e.g., *Bruce v. Estelle*, 536 F.2d 1051, 1060 (5th Cir. 1976), cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977) (Judge Mahon's reliance on Dr. Grigson's diagnosis held clearly erroneous); *Benavides v. Mutual Life Insurance Co.*

needed.

Dr. Grigson's psychiatric testimony may be summarized as follows. On direct examination he testified (1) to his credentials as a psychiatrist; (2) to the types of examinations administered by him to Smith; (3) to the results of those examinations; (4) that Smith is medically and legally sane; (5) that Smith has a sociopathic personality disorder; (6) to the characteristics of the sociopath; (7) that there are degrees of sociopathy and Smith is on the very severe end of that scale; (8) that the prognosis is Smith will continue his previous behavior or get worse; (9) that Smith has no regard for other persons' property or lives; (10) that no treatment to improve his condition exists; (11) that Smith will commit criminal acts of violence that will constitute a continuing threat to society if given the opportunity to do so; (12) that Smith is a leader. On cross examination Dr. Grigson testified (1) that it is not known what causes a person to be a sociopath; (2) that for the basis of his diagnosis, he spent approximately an hour and one-half examining Smith but did not interview friends and relatives who knew Smith with the exception of Howie Robinson whom he examined in connection with Robinson's criminal trial arising out of the same incident; (3) that he is certain that Smith is a severe sociopath; (4) that his diagnosis of socio-

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of New York, 516 F.2d 393, 398-99 (5th Cir. 1975); *Bruce v. Estelle*, 483 F.2d 1031, 1035, 1038-40 (5th Cir. 1973); *Collins v. State*, 548 S.W.2d 368, 377-78 (Tex.Cr.App.1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1611, 51 L.Ed.2d 811 (1977); *Graham v. State*, 546 S.W.2d 605, 609 (Tex.Cr.App.1977); *Ex Parte Dickey*, 543 S.W.2d 99, 104 (Tex.Cr.App.1976); *Livingston v. State*, 542 S.W.2d 655, 661-62 (Tex.Cr.App.1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); *Lee v. Thomas*, 534 S.W.2d 422, 424 (Tex.Civ.App. Waco, 1976, ref., n.r.e.); *Hicks v. State*, 525 S.W.2d 177, 180 (Tex.Cr.App.1975); *Garza v. State*, 522 S.W.2d 693, 694 (Tex.Cr.App.1975); *Jackson v. State*, 516 S.W.2d 167, 173 (Tex.Cr. App.1974); *Hurd v. State*, 513 S.W.2d 936, 946 (Tex.Cr.App.1974); *Armstrong v. State*,502 S.W.2d 731, 735 (Tex.Cr.App. 1973); *Culley v. State*, 505 S.W.2d 567, 569 (Tex.Cr.App. 1974); *Wilborn v. State*, 491 S.W.2d 432, 433 (Tex.Cr.App.1973); *Boss v. State*, 489 S.W.2d 580, 582 (Tex.Cr.App.1973); *Williams v. State*, 463 S.W.2d 15, 17 (Tex.Cr.App. 1971); *Blankenship v. State*, 432 S.W.2d 945, 946-47 (Tex.Cr.App. 1968).

pathic personality was based on Smith's failure to show any guilt feelings or remorse with respect to the commission of the offense for which he was on trial; (5) that during the examination Smith was pleasant, cooperative, polite, intelligent, rational, courteous, and did not try to fake insanity; and (6) that sociopathic symptoms may show up as early as age four or five, or may not appear until age thirty.[8]

Dr. Grigson was the state's only witness at the punishment phase. After his testimony concluded, the jury retired to consider its verdict. It returned with "yes" answers to all three questions which meant that under Texas law Ernest Benjamin Smith would be put to death. The Texas Court of Criminal Appeals affirmed Smith's conviction and his sentence.[9] The United States

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[8] The summary of Dr. Grigson's testimony is borrowed largely from the excellent summary found in Judge Odom's opinion dissenting in part from the ruling of the Texas Court of Criminal Appeals in this case. After the U.S. Supreme Court ruled in *Jurek*, Judge Odom withdrew his dissent. One other matter concerning Dr. Grigson's testimony concerns this Court.

Dr. Grigson testified that: "With regard to his (Smith's) emotional state, for the most part throughout the examination he was very pleasant, very cooperative, very polite. The one significant fact which was present was I could find absolutely no signs of any remorse or any type of guilt feelings. I thought this was very important in the situation that existed."

"Again, I could find no remorse feelings, no guilt feelings." Record at 2941.

It appears that Smith made a "quasi" confession during the course of the examination as was brought out during cross examination of Dr. Grigson. Record at 2950-52. Therefore, it appears that Smith, in effect, established his guilt in Dr. Grigson's eyes which enabled him to determine that the defendant showed no remorse or guilt feelings which in turn formed the basis for the diagnosis. Although not the case here, it troubles this court that a psychiatrist might, during an examination where no "confession" is given, assume the defendant's guilt which then forms the basis of the psychiatric diagnosis. This certainly seems to be at odds with the presumption of innocence to which all criminal defendants who plead not guilty have a constitutional right.

[9] *Smith v. State of Texas*, 540 S.W.2d 693 (1976).

Supreme Court denied certiorari.[10] A state writ of habeas corpus was denied by Judge Scales on April 18, 1977. The Texas Court of Criminal Appeals denied a similar writ on April 19, 1977 and Smith's execution was set for April 26, 1977. On April 22, 1977 I entered an order staying that execution pending review of Smith's federal writ of habeas corpus filed April 21, 1977.

That review has now been completed and because I find the death penalty was imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution it is hereby vacated. No constitutional error has been found with respect to the guilt phase of the trial.[10A]

Having reviewed the relevant facts of this case and having stated my legal conclusions, I would like to elaborate on why these facts present issues of constitutional dimension.

A. Due Process of Law.

A majority of the United States Supreme Court has held that the death penalty not only differs in degree from any other punishment that may be imposed but that it is different in kind. It is therefore imperative both to the defendant and the community that the decision to impose the death penalty reflect a reasoned judgment devoid of caprice or emotion and derived from all the available evidence presented at a fair proceeding. *See Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct.

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[10] 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977).

[10A] The State takes the position that Smith may not be retried under state law on punishment alone. Thus, the State contends, that if Smith is to be given the death penalty he must also be tried again on guilt or innocence. This is a question of state law and need not be addressed here. If permissible under state law the attorney general may wish to forego a retrial on punishment which would result—presumably—in a life sentence. Whatever decision the Texas Court of Criminal Appeals reaches on these issues it should be clearly understood that I find constitutional violations only at the punishment stage and not during the guilt or innocence proceedings.

1197, 51 L.Ed.2d 393 (1977); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The fairness of the sentencing process is measured by the due process clause, and, as it is a critical stage of the criminal proceedings, the defendant is entitled to the effective assistance of counsel. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. *Gardner v. Florida, supra*, 430 U.S. at 358, 97 S.Ct. at 1205.

As the Supreme Court has often stated "once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). In general the procedural protections required by the due process clause vary according to the demands of the particular situation. In this case I find that because of the private interest affected by the government's action the situation demanded more procedural protection than was afforded.

The state's evidence at the punishment stage was introduced in such a way as to deny defense counsel effective cross examination of Dr. Grigson. It is impossible for even the best lawyers to effectively cross examine a medical expert without any preparation. A review of the record shows that Mr. Simmons was not an exception to this rule. Although a psychiatrist's methodology and conclusions are susceptible to impeachment by those knowledgable in the field, they are virtually impregnable to challenge by one who is not a psychiatric expert and totally unprepared to question on this subject matter. Mr. Simmons did not know that Dr. Grigson was going to be a witness at the punishment proceedings until a few minutes before he was called. Effective cross examination under these circumstances was virtually impossible. Criminal convictions have been reversed in the past when they have been procured through government

"cloak and dagger" tactics in introducing surprise testimony. *See Riggs v. United States*, 280 F.2d 750, 753-54 (5th Cir. 1960).

Dr. Grigson's testimony was also presented—after the defense had rested—in a manner which precluded the opportunity to obtain expert psychiatric testimony for the defendant.[11] Effective cross examination and the ability to obtain a psychiatric expert for the defendant are especially critical when psychiatric testimony is introduced because studies have shown that the opinions of psychiatrists in this area are often unreliable and invalid.[12] The unreliability and invalidity of the opinion is heightened

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[11] The Fifth Circuit Court of Appeals has held that failure to provide expert psychiatric assistance may deprice an indigent defendant of effective assistance of counsel. *Greer v. Beto*, 379 F.2d 923, 924 (5th Cir. 1967). *Hinz v. Beto*, 379 F.2d 937 (5th Cir. 1967).

[12] "Reliability" and "validity" are terms of art found in the psychiatric literature. Reliability does not have a precise meaning. See L. Cronbach, Essentials of Psychological Testing 173-82 (3rd ed. 1970). Reliability generally refers however, to the probability or frequency of agreement when two or more independent observers answer the same question. For example, is Smith dangerous? If representative pairs of psychiatrists, interviewing a representative sample of prospective patients, usually agree that each individual is or is not "dangerous" the judgment of "dangerousness" is said to be reliable. Conversely, if pairs of psychiatrists would not usually agree whether such individuals are dangerous, that judgment is said to be unreliable.

"Validity," on the other hand, refers to not how likely psychiatrists are to agree to a particular judgment but to how accurate their judgments are. If every psychiatrist in the world agrees that Smith would commit a dangerous act if released from the hospital, that judgment would be 100% reliable. But if Smith were released and does not commit a dangerous act, the judgment would be invalid. Similarly, psychiatric judgments of "dangerousness" would be generally reliable if most observers would agree whether or not given individuals are dangerous, yet invalid if those judgments usually would be wrong.

For studies detailing the invalid and unreliable nature of psychiatric examinations *see, generally* Ennis & Flitwack, Psychiatry and the Presumptions of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 697 (1974) (Footnotes omitted).

where, as here, the psychiatrist is appointed for one purpose—to determine competency—but testifies on a completely different matter—whether the defendant will commit similar acts of violence in the future, (hereinafter referred to as "dangerousness").[13] The prejudice is compounded when the Court—by permitting the prosecutor to inform the jury that the doctor is court appointed—vouches in effect for the accuracy of the psychiatrist's opinions on "dangerousness" even though the judicial appointment was to determine "competency."

Even a cursory review of the psychiatric literature reveals that psychiatrists differ widely in their diagnosis of the same patients. The testimony of psychiatric experts is receiving increased judicial scrutiny because of its unreliable and invalid nature. *See United States ex rel. Wax v. Pate*, 298 F.Supp. 164 (N.D.Ill.1967), *affirmed* 409 F.2d 498 (7th Cir.), *cert. denied*, 396 U.S. 830, 90 S.Ct. 83, 24 L.Ed.2d 81 (1969). *Cf. Specht v. Patterson*,

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[13] In *United States v. Mattson*, 469 F.2d 1234 (9th Cir. 1972) cert. den'd, 410 U.S. 986, 93 S.Ct. 1513, 36 L.Ed.2d 183 (1973) the court indicated that unless counsel was notified of the dual purpose of the psychiatric exam—determination of both competency and sanity—was ordered the psychiatric evidence would be inadmissible. In *United States v. Alvarez*, 519 F.2d 1036, 1041 (3rd Cir. 1975), the court held that failure in an order, to provide for the dual nature of the examination would render the psychiatric testimony inadmissible. *See also Birdsell v. United States*, 346 F.2d 775 (5th Cir. 1965), cert. denied, 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366 (1966) where the court stated:

> "Although '[I]t is not to be assumed * * * that a psychiatrist who has been ordered to prepare an opinion as to a man's trial competency will conduct the type of examination which is necessary to provide the trier of the facts with the information essential for a proper determination of criminal responsibility,' *Winn v. United States* [106 U.S.App.D.C. 133], 270 F.2d 326, 328 (1959), a record may show that this was in fact done, and we think that was the case here." 346 F.2d at 780.

See also United States v. Driscoll, 399 F.2d 135, 137 (2nd Cir. 1968) ("We do not believe that a defendant can be told that he is to be examined for one purpose and, once his cooperation has been obtained, be advised of another.")

386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).[14]

This judicial scrutiny reflects skepticism among experts in the field itself. In 1969 Professor Dershowitz reviewed studies on the predictions of anti-social conduct and concluded:

> ". . . that psychiatrists are rather inaccurate predictors—inaccurate in an absolute sense and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes, it seems that psychiatrists are particularly prone to one type of error—over prediction. They tend to predict antisocial conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions. That is, among every group of inmates presently confined on the basis of psychiatric predictions of violence, there are only a few who would, and many more who would not, actually engage in such conduct if released."

Dershowitz, The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways, *Psychology Today*, Feb. 1969, at 47.

Recent studies support Professor Dershowitz's conclusions: "perhaps the most striking evidence supporting Dershowitz's conclusions comes from the study of the results of "Operation Baxstrom" involving 969 prisoner-patients in New York State who were affected by

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[14] As the court in *United States ex rel. Wax v. Pate*, 298 F.Supp. 164, 167 (N.D.Ill.1967) noted:

> "It is an accepted fact of which the court will take notice that the results of psychiatric observations and examinations are often a good bit more conjectural than the results of scientific laboratory tests on finger prints, blood samples, hair and the like. The variables and technique are many. And indeed, considerable ferment has been engendered as to the sufficiency of the present legal tests of insanity."

the Supreme Court's decision in *Baxstrom v. Herold.* [383 U.S. 107, 86 S.Ct. 760 15 L.Ed.2d 620 (1966)]. The Court held that those persons remaining in Department of Corrections Hospitals after their prison terms had expired must be released, and committed civilly, if at all. Each of the 969 patients had been detained in maximum-security hospitals because psychiatrists determined that they were mentally ill and too dangerous for release or even for transfer to civil hospitals. Nevertheless, one year after the patients were transferred to civil hospitals, 147 had been discharged to the community and the 702 who remained were found to present no special problems to the hospital staff. Only seven patients were found to be so difficult to manage or so dangerous as to require recommitment to a Department of Corrections hospital. Several years later, 27% of the patients were living in the community, only nine had been convicted of a crime (only two of felonies), and only 3% were in a correctional facility or hospital for the criminally insane.

"Another recent study, described by one observer as the 'most extensive study to date on the prediction . . . of dangerousness in criminal offenders' confirms the lesson of *Baxstrom.* A team of at least five mental health professionals, including two or more psychiatrists, was asked to conduct unusually thorough clinical examinations of individuals who had been convicted previously of serious assaultive crimes (often sexual in nature), assigned to special treatment programs after conviction, and who were then eligible for release. Based upon the examinations, extensive case histories, and the results of psychological tests, the team attempted to predict which individuals again would commit assaultive crimes if released. These predictions of dangerousness were made prior to the court hearings at which the ultimate release decisions were made. Of 49 patients considered by the evaluating team to be dangerous and therefore not recommended for release, but who nevertheless were released after a court hearing, 65% had not been found to have committed a violent crime within five years of

returning to the community. *In other words, ⅔rds of those released despite predictions of dangerousness by the professional team did not in fact turnout to be dangerous.*" Ennis & Litwack, Psychiatry and the Presumptions of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 712-13 (1974) (Footnotes omitted) (emphasis supplied.)

I do not believe that psychiatric testimony should be excluded per se from the guilt/innocence trial and/or circumscribed in the punishment stage as some legal scholars have suggested. *See Bartholomew & Milte*, The Reliability and Validity of Psychiatric Diagnosis in Courts of Law, 50 Austr.L.J. 450 (1976). I hold only that when the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant. When that fair opportunity is denied the defendant, as it was here, our adversary system breaks down and a man is unjustly sentenced to die.

In the future to insure the right to effective cross examination and the right to effectively defend the case through expert rebuttal testimony, which the due process clause guarantees, defense counsel must be notified that a psychiatric examination will be held on the issue of "dangerousness" the results of which may be used at the penalty phase of the trial. Defense counsel prior to trial, must have meaningful access to the report, now required by state statute, prepared by the psychiatrist stating his findings and conclusions. If the trial court wishes to appoint a psychiatric expert on the issue of dangerousness the order of appointment should so reflect. The testimony of a court appointed psychiatrist and his report would then be equally available to both defense and prosecution for presentation to the jury.[15]

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[15] When the psychiatrist is not appointed on the issue of "dangerousness" (but limited to competency, for example) and the prosecutor nevertheless intends to use the psychiatrist at the penalty

However, both sides should have a meaningful right to obtain additional psychiatric experts to either supplement or challenge the conclusions of the court appointed expert.

In summary, the due process clause of the Fourteenth Amendment was violated in this case because (1) Dr. Grigson was informed of his appointment by the prosecutor and not through written order of the court; (2) defense counsel was never notified of the appointment; (3) a psychiatric report was never filed; (4) defense counsel never received a copy of Dr. Grigson's letter summarizing his conclusions, sent to the judge; (5) the state's attorney intentionally omitted Dr. Grigson's name from the witness list in violation of the trial court's order even though the prosecutor knew at least several days before the punishment stage that Dr. Grigson would be called as a witness and that his testimony would not be rebuttal testimony but would be critical to the state's case; (6) the psychiatrist was appointed to determine competency but was permitted to testify on the completely unrelated issue of "dangerousness" and; (7) the trial judge permitted the state's attorney to create the impression with the jury that Dr. Grigson had been appointed by the court for the purpose of determining the defendant's "dangerousness" and that the court was therefore vouching for Dr. Grigson's testimony.[16]

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stage on the issue of dangerousness, notice of this intention must be given to defense counsel. In that event, the jury may not be told that the psychiatrist is court appointed.

[16] Under the above described circumstances, I find that Mr. Simmons and Mr. Wilson protected their client's interest to the extent possible. However, if one assumes that there is no error in the manner in which Dr. Grigson's testimony was introduced, that would inevitably lead to the conclusion that Smith was denied the effective assistance of counsel because they failed to produce rebuttal psychiatric testimony and to explore the ramifications of the psychiatric issue. *See United States v. Edwards*, 488 F.2d 1154, 1164-65 (5th Cir. 1974). If I found Mr. Simmons and Mr. Wilson did not provide effective assistance of counsel, which I decline to do, then Smith's penalty would be rendered constitutionally invalid on that ground.

B. The Death Penalty and Mitigating Circumstances: The Eighth Amendment.

In *Jurek v. State of Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) the United States Supreme Court upheld the constitutionality of the Texas Death Penalty Statute.[17] It found that at the sentencing stage the Texas statute assured that all possible relevant information about the individual defendant would be brought before the jury. *Jurek, supra* at 271-76, 96 S.Ct. 2950. The constitutionality of the Texas procedure rests upon the ability of the defendant to present mitigating circumstances.

For the same reasons specified in subsection A of this opinion, I find that the defendant was, in effect, denied the opportunity to present mitigating circumstances concerning his supposed personality disorder. The opportunity to effectively challenge Dr. Grigson's conclusion was not available. The opportunity to obtain and present psychiatric testimony on behalf of the defendant was not present. Finally, Dr. Grigson testified that defendant showed no remorse or guilt over the incident. When Mr. Simmons attempted to question Smith about his remorse or guilt the following took place:

Q. By Mr. Simmons: Did you tell Howie to look out when you saw Mr. Moon either reaching for a pistol or whatever else he had?

A. Yes, sir.

Q. Ernest, do you understand and know that it is wrong to do what you did and what you were involved in?

A. Yes, sir.

Q. Do you regret this thing has happened to Mr. Moon? (the murder victim)

A. Mr. Mulder, State's Attorney. We object to that.

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[17] Tex.Penal Code § 19.03 (1974); Tex.Code Crim.Pro. Art. 37.071 (Supp.1975-76).

The Court: Sustained.

Mr. Simmons: We will pass this witness, your Honor.[18]

The Texas statute, on its face, provides that all relevant evidence will be presented to the jury but, as applied in this case, the jury was clearly unable to consider all the evidence.[19] Accordingly, the death penalty in this case constitutes cruel and unusual punishment. Here the jury was told all the reasons why the death sentence should be imposed but only some of the reasons why it should not. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The State was directly responsible for causing the suppression of the additional reasons why the death penalty should not be imposed.

C. Right to Counsel and Right to Remain Silent.

In addition to challenging the death penalty on due process and Eighth Amendment grounds, petitioner has alleged a violation of right to counsel and the right to remain silent with respect to his compelled psychiatric examination. The state has responded to these chal-

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[18] Record at 2743-44. I do not believe that this was necessarily an improper objection or that the trial judge ruled erroneously. It is generally immaterial that a criminal defendant regrets now what he did in the past. At the time this objection was lodged the jury had not yet found Smith guilty. Only Mr. Mulder knew at that point in the trial that Dr. Grigson would put into issue the defendant's lack of remorse or guilt. With this knowledge the objection was perhaps improper as the jury could have been instructed not to consider the testimony on the issue of guilt but only on punishment if they returned a guilty verdict. The better procedure, however, would be to recall the defendant at the punishment phase and ask him the material questions then. Mr. Simmons, for some reason, did not do that in this case.

[19] *See Richmond v. Arizona*, ____U.S.____, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977) (Rehnquist, J.) where defendant's sociopathic personality was presented as a mitigating factor at the punishment phase. While a sociopathic personality might in some cases be used in mitigation it was not done so in this case. The state clearly argued that this sociopathic personality disorder made the defendant "dangerous" thus requiring an affirmative answer to question 2.

lenges on the merits even though neither was a ground for objection at the trial court and neither issue was presented to the Texas Court of Criminal Appeals.[20] It must be determined whether the Texas "True Contemporaneous Objection Rule" bars considerations of these two claims in this federal habeas corpus proceeding. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Jiminez v. Estelle*, 557 F.2d 506 (5th Cir. 1977); *Patterson v. State of Texas*, 509 S.W.2d 857 (Tex.Crim.App.1974). A federal district court may consider a claim in a habeas corpus petition that was not presented to the state courts, if it determines the petitioner has shown "cause" for failing to object in state court with resulting "prejudice" to the defendant. To fully develop the record, I have asked Mr. Simmons to file an affidavit explaining the reason (cause) why he did not raise these objections before either Judge Scales or the Texas Court of Criminal Appeals.

Before considering whether the showing of "cause" and "prejudice" is adequate under *Sykes*, the court must determine whether in a federal habeas corpus proceeding the state may waive the "contemporaneous objection" defense. In both *Sykes* and *Jiminez*, the state sought to uphold the convictions on the basis of the contemporaneous objection rule. *See Sykes*, at 433 U.S. 84, at 97 S.Ct. 2505-06, at 53 L.Ed.2d 607; *Jiminez* at 557 F.2d 507. Here, however, the state has joined issue on the alleged right to counsel. Likewise, the state has responded on the merits to the contention that the accused has a right to remain silent at the psychiatric exam and must be advised of that right.

It is certainly beyond question that procedural rights may be waived. There is nothing about the state's relinquishment of this procedural advantage that affects this court's jurisdiction or eliminates the existence of a live

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[20] These matters were apparently first raised in the petitioner's writ of habeas corpus before Judge Scales and subsequently, the Texas Court of Criminal Appeals. Both writs were denied without a hearing.

case or controversy. Accordingly, I hold that the "contemporaneous objection" defense may be waived and is so waived when the state decides to answer on the merits without relying either solely or in the alternative on the contemporaneous objection rule.

Even though this rule is designed to produce criminal proceedings which are as free of error as possible, the state is to be commended for not raising this procedural bar here where a constitutional issue of first impression is presented to a federal court. Although the interest in minimizing error in criminal proceedings is a weighty concern, the state also has a strong interest in determining as soon as practicable whether its procedures implementing a recently enacted statute comply with the United States Constitution.

The Texas Death Penalty Statute was revised in light of *Furman v. Georgia, supra*, and only recently upheld by the United States Supreme Court. The practice of introducing psychiatric testimony at the punishment stage of a capital case is, therefore, in its infancy. If the right to counsel and/or right to remain silent apply in a psychiatric examination, it is better for the state—in terms of minimizing error in criminal trials—to have that determination made now rather than later.

As I have found the contemporaneous objection rule inapplicable in this case, it is unnecessary to determine whether Mr. Simmons' "cause" for failing to object is adequate under *Sykes*. If I am wrong in this determination, however, the record has been made for the appellate courts, in the case of appeal, to make that determination. As outlined in Subsection A of this opinion, I believe the requirement of prejudice has clearly been met.

1. The Right to Counsel.

The Texas Court of Criminal Appeals held in *Livingston v. State of Texas*,[21] that the use of testimony ob-

[21] 542 S.W.2d 655 (Tex.Cr.App. 1976), cert. denied. 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977).

tained from a compelled psychiatric examination in a capital murder sentencing hearing does not violate the Sixth Amendment right to counsel. The Court relied on prior holdings which found no right to counsel at a psychiatric examination on competency or sanity. Although some courts require the presence of counsel[22] at a competency or sanity examination the majority view is to the contrary.[23] The 5th Circuit Court of Appeals squarely subscribes to the majority view that there is no right to counsel in a compelled psychiatric examination to determine competency or sanity. *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *cert. denied* 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976); *United States v. Smith*, 436 F.2d 787, 790 (5th Cir. 1971), *cert. denied*, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971).

The question then boils down to whether a distinction may be made between psychiatric examinations for determinations of competency or sanity and psychiatric examinations for "dangerousness." One reason for denying the right to counsel is common to all three—the presence of counsel would destroy the purpose of the examination. See *Thornton v. Corcoran*, 132 U.S. App.D.C. 232, 248, 407 F.2d 695, 711 (1969) (Burger, J., Dissenting). I agree with the comment of the now chief justice that:

> "Our approach should encourage an attitude of cooperation rather than partisanship; emphasis must be on the common pursuit for an objective, uninhibited inquiry, uncluttered by the techniques and devices of the courtroom." 132 U.S.App. D.C. 248, 407 F.2d 711.

Any right to counsel in this area would therefore have to consider the practical limitations of the psychiatric examination. In *United States v. Wade*[24] the Supreme

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[22] *See e.g. Lee v. County Court of Erie County*, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 (1971).

[23] *See e.g. United States v. Albright*, 388 F.2d 719 (4th Cir. 1968).

[24] 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

Court held there was a right to be represented by counsel at a police lineup. The *Wade* court proposed two tests for determining whether the presence of counsel is necessary: (1) potential substantial prejudice to defendant's rights which inheres in a particular confrontation and (2) the ability of counsel to help avoid that prejudice. *See United States v. Baird*, 414 F.2d 700, 711 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1005, 90 S.Ct. 559, 24 L.Ed.2d 497 (1970).

If the state follows the procedures outlined in Part A of this opinion, I have found compelled by the due process clause, the potential for substantial prejudice is minimized.[25] If one accepts that counsel may not participate in the examination, as one must if its purpose is to be preserved then the lawyer's ability to avoid any residual prejudice is minimal. I therefore hold that the right to presence of counsel is not required in a compelled psychiatric examination for the purpose of determining "dangerousness," even though I believe the examination is a critical stage of the criminal proceedings. The Sixth Amendment is not so inflexible as to require the presence of counsel when that presence would destroy the character of the proceeding, especially in light of minimal prejudice to the defendant.

The Sixth Amendment, however, also required the effective assistance of counsel. To insure this right the procedural safeguards required in Subsection A of this opinion are compelled by the Sixth Amendment as well as the due process clause of the Fourteenth. As they were unavailable to petitioner here his sentence is invalid under the Sixth Amendment.

As Chief Justice Berger observed in *Thornton*, the check on the processes by which the psychiatrist reaches his conclusion is the power to cross-examine him. Because the psychiatric examination demands privacy, the presence of counsel is not required so long as

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[25] The actual statements of the accused to the psychiatrist are inadmissible at the guilt and possibly the punishment phases of the trial. *See Livingston v. State, supra*, at 661-62.

the power of effective cross-examination and the right to gather additional expert psychiatric testimony is not impaired. 132 U.S.App.D.C. at 248, 407 F.2d at 711. That right was clearly impaired here.

2. The Right to Remain Silent.

Petitioner claims his right to remain silent under the Fifth Amendment was violated when he was examined by Dr. Grigson without notice to his counsel and without being advised that he had a right to remain silent. The State contends that there is no constitutional right involved because communications at the psychiatric examination are non-testimonial. One commentator has written that this is the "best" reason for holding that the Fifth Amendment privilege against self incrimination does not apply to a compelled psychiatric examination on the issue of dangerousness. *See* Crump, Capital Murder: The Issues in Texas, 14 Hou.L.Rev. 531, 574-75 (1977).

The Texas Court of Criminal Appeals has refused to apply the Fifth Amendment privilege to a compelled psychiatric examination on dangerousness. The court found that the communications involved in such an examination were not testimonial. *See Livingston v. State of Texas*, 542 S.W.2d 655 (Tex.Cr.App.) *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977).

A federal court is not, of course, bound by a state court's determination of federal law. I believe, therefore, an independent look at this problem is required. so-called "testimonial" limitation on the privilege against self incrimination is rooted in Mr. Justice Holmes' opinion in *Holt v. United States*, 218 U.S.245, 31 S.Ct.2, 54 L.Ed. 1021 (1910). In *Holt* the Defendant was compelled to try on a blouse to show that it fit him. Mr. Justice Holmes stated that: "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to exhort communications from him, not an exclusion of his body as evidence when it may be material." 218 U.S. at 252-53, 31 S.Ct. at 6. In *Schmerber v.*

California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) the Supreme Court followed the Holmes reasoning in holding that the privilege against self incrimination was not violated by the taking of a blood sample over the objection of a criminal defendant. It was held that the resulting blood sample "was neither petitioner's testimony nor evidence relating to some communicative act. . . ." 384 U.S. at 765, 86 S.Ct. at 1833.

In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) the Supreme Court found no Fifth Amendment violation where the Defendant was compelled to speak within hearing distance of witnesses to the alleged crime. The court found this "no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse." 388 U.S. at 222, 87 S.Ct. at 1930. In *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) the court held that requiring a Defendant to provide a handwriting exemplar would not violate the privilege. The Court stated that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." 388 U.S. at 266-267, 87 S.Ct. at 1953.

Finally, in *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) the court refused to apply the privilege to compelled voice exemplars which were obtained for comparison with tape recordings of alleged criminal activity. The Court wrote: "*Wade* and *Gilbert* definitely refute any contention that the compelled production of the voice exemplars in this case would violate the Fifth Amendment. The voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said." 410 U.S. at 7, 93 S.Ct. at 768. (footnote omitted).

All of these cases reach only those situations where identifiable physical characteristics or properties of the Defendant are compelled. *See People v. Evans*, 90 Misc.2d 195, 393 N.Y.S.2d 674 (1977).[26] It does not mat-

[26] It strikes the court that an issue of reliability is also raised even if

ter what the Defendant speaks or what he writes when a voice or handwriting exemplar is produced. The Defendant is only being compelled to divulge the way he speaks or the manner in which he writes both of which are non-testimonial acts to which the privilege does not apply.

The compelled psychiatric examination on the issue of "dangerousness" clearly rests on different ground. Here it is not only the *way* the Defendant communicates to the psychiatrist, but also the content of *what* he says that forms the basis of the expert opinion.[27]

I, therefore, do not believe that the *Holt* line of cases inevitably leads to the conclusion urged by the State. Each of these cases has been careful to distinguish between the "content" of the communication and the "fact" of the communication. No such distinction is possible where the psychiatrist, as here, relies, at least in part, on the *content* of the communication elicited from the Defendant.[28]

It might be argued that while the Supreme Court has not extended the *Holt* doctrine to compelled psychiatric

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one assumes that the communications in a psychiatric examination are non-testimonial. This involves the requirement that the physical characteristics or properties be identifiable. No two lab technicians would disagree over the results of a blood sample or a fingerprint. Handwriting exemplars and voice exemplars may also be analyzed with some precision. A diagnosis of a person's present and past mental condition is less reliable but nevertheless much more accurate than a prediction of future behavior which inheres in a diagnosis of "dangerousness".

[27] For example:

Psychiatrist: Do you feel remorse over the victim's death?
Defendant: No I do not.
Psychiatrist: Do you feel guilt over the victim's death?
Defendant: No I do not.
Psychiatric Conclusion: The defendant shows no remorse or guilt over the victim's death and, principally for this very important reason, I believe he is a severe sociopath.

[28] Dr. Grigson clearly relied at least in part on Smith's oral communication that he felt no remorse or guilt over the incident.

examinations, many decisions of the circuits have done so with respect to the issues of competency and sanity. However, the issues of competency and sanity are distinguishable from an examination for dangerousness. When the issue of sanity is raised by the Defendant, some courts have held that the psychiatric examination may be compelled by either the state or the court as the privilege against self incrimination has either been waived or the Defendant is estopped from asserting it. *See e.g., Lee v. County Court of Erie County*, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 (1971). When the sanity defense is raised the Government must prove that the Defendant was not insane at the time the crime was committed and often the only way it may meet this burden is through expert psychiatric testimony.[29] Sanity is therefore an issue raised by the defendant where the only evidence to rebut the defense is in the possession of the defendant. Dangerousness, by contrast, is an issue raised by the prosecution where psychiatric testimony is only one of a number of ways the issue may be proved to the jury.

The issue of competency raises somewhat different problems. First, if raised by the Defendant the same principles of waiver and estoppel might apply. Second, and more importantly, psychiatric testimony on competency can rarely be used against the criminal Defendant. In many states the issue must be determined prior to the trial on the merits.[30] Third, the state and the Defendant do not have truly adverse interests in a competency evaluation. Both seek to have only mentally com-

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[29] *See, e.g., United States v. Cohen, supra.* Here, however, there are a number of other ways for the state to show "dangerousness". Thus, the jury could consider the defendant's prior criminal record, if any; the range and severity of his prior criminal conduct; his age; whether he was acting under duress or under the domination of another; and efforts to rehabilitate himself after a criminal conviction. *See Jurek v. State of Texas*, 428 U.S. at 272-73, 96 S.Ct. 2950.

[30] *See, e.g.*, Tex.Code Crim.Pro. Art. 46.02 § 2 (Supp.1976-77).

petent Defendants stand trial.

The benign effect of psychiatric testimony on the issue of competency differs sharply from the psychiatric testimony of "dangerousness". Dr. Grigson's testimony was clearly used against Smith at the punishment stage. The State, at least at one point in this litigation,[31] took the position that the only evidence in support of the jury's answer to question number two was the Grigson testimony. This testimony would have been gutted—if not rendered completely worthless, without the cooperation of Smith. That cooperation took the form of a 90 minute interview where the contents of his communications to Dr. Grigson were used against him by the State at the punishment stage of the trial.[32]

It is clear, however, that the psychiatric knife can cut both ways. Psychiatric testimony could be as beneficial to some criminal Defendants at the punishment stage as it was damaging to Smith. It may be difficult to determine prior to an examination what conclusions will result, although certain psychiatrists may gain a reputation for seeing problems in a particular way.

If the Defendant initiates a psychiatric examination on the issue of dangerousness or if he seeks to introduce psychiatric testimony at the punishment phase he can not hide behind his privilege against self incrimination when the court or the prosecutor seek to have him examined by an additional psychiatrist, or when the prosecutor attempts to introduce the testimony by the

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[31] In its brief submitted to the Texas Court of Criminal Appeals the state relied solely upon Dr. Grigson's testimony to support the jury finding on question 2. The Court of Criminal Appeals seemed to rely in addition on the facts of the primary offense, a five year probated sentence for possession of marijuana and a poor employment record.

[32] It would be constitutionally permissible for a psychiatrist to merely observe the defendant for the purposes of diagnosis. But whether mere observations would be legally sufficient to form the basis for a medical opinion on dangerousness need not be decided here.

Defendant's expert, or its own expert at the punishment phase. In such cases the Defendant would waive his privilege against self incrimination, and also any doctor-patient privilege.

If, however, the Defendant does not request a psychiatric examination on the issue of "dangerousness" and does not seek to introduce testimony on this issue, he may not be compelled to participate in a psychiatric examination to determine dangerousness.

A difficult problem of waiver is presented when the Defendant raises the insanity defense but is nevertheless found guilty. At the punishment stage may the jury consider the psychiatric evidence on sanity as a mitigating factor and, if so, may the state then introduce psychiatric testimony on dangerousness? Ordinarily the jury would be permitted to consider the Defendant's psychiatric evidence on sanity as a mitigating factor. If the Defendant intends to rely on this testimony at the punishment stage, he then waives his privilege against self incrimination and the State may have a psychiatrist examine the Defendant on the issue of dangerousness and introduce testimony on this issue before the jury.

If, however, the Defendant does not wish to rely on his psychiatrist's insanity testimony at the penalty stage then the jury must be instructed to disregard the psychiatric testimony as a mitigating factor and the privilege against self incrimination may be asserted to foreclose either a compelled psychiatric examination on the issue of dangerousness or evidence from a court appointed or state psychiatrist on dangerousness learned from a sanity or competency examination.

In the future if the State or Court seeks to have the Defendant examined by the psychiatric expert on the issue of dangerousness, the Defendant must be advised he has a right to remain silent. If the Defendant indicates that he wishes to exercise that right, he may be questioned by the psychiatrist for the purpose of determining dangerousness.

Smith was not so advised in this case and his sentence

of death is thus in violation of the Fifth Amendment of the United States Constitution.

(D) Conclusion.

The Petitioner has alleged several additional constitutional violations[33] but as I have found no such violation with respect to the guilt or innocence phase and as I have granted the relief requested with respect to the punishment phase it is unnecessary to reach these additional issues.

In summary, it is this Court's opinion that:

(1) The circumstances surrounding the state's presentation of Dr. Grigson's testimony at the punishment stage of the trial were grossly unfair and the Defendant was thus denied due process of law;

(2) The Defendant was effectively denied the right to present complete testimony regarding mitigating factors on his alleged personality disorder which supposedly makes him a continuing threat to society;

(3) The Defendant was denied the right to effective assistance of counsel because of the methods employed by the state with respect to the Grigson testimony; there is, however, no right to the presence of counsel at a psychiatric examination on dangerousness;

(4) The Defendant was not advised of his right to re-

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[33] The petitioner raises an interesting point concerning the severity of the death penalty for a defendant who does not actually pull the trigger. This is the so-called non-triggerman issue which is currently before the United States Supreme Court. *Bell v. Ohio*, 433 U.S. 907, 97 S.Ct. 2971, 53 L.Ed.2d 1091 (1977).

It strikes this court that there may be instances where the non-triggerman is just as culpable as the triggerman. I believe this case is one of them although the fact that this defendant did not actually commit the murder certainly is a mitigating factor for the jury's consideration. At any rate, I believe it would be unwise to adopt a *per se* rule for non-triggermen. One can envision a situation where one person, shouldering and aiming a bazooka for his trigger pulling accomplice is as culpable as his cohort.

Whatever the merits or demerits of this controversy, it should be resolved soon by the Supreme Court and, in light of the present posture of this case, it is unnecessary to decide that question here.

main silent at the psychiatric examination on dangerousness where he did not seek to introduce psychiatric testimony on the issue himself at the punishment stage or at the guilt/innocence stage and where he did not initiate a psychiatric examination on the issue.

Some may be shocked that a convicted murderer has for the moment escaped death through what may seem to them a legal technicality. But whereas "technicalities" are often thought of as mindless and silly elevations of form over substance the procedures denied to the Defendant in this case are basic and fundamental. They may be summed up in one word—fairness. And one need not condone the acts of this Defendant to agree that he is entitled to a fair proceeding and that he is entitled to the same opportunity to put on his evidence as is given the State.

Our legal procedures—as opposed to superfluous "technicalities"—separate our judicial system from virtually all others in the history of the world. They separate us from those systems where rights are guaranteed on paper but denied in practice. They separate us from those systems where the guilt of the Defendant is never to be doubted. They separate a free country from a controlled one.

The money and effort the State of Texas will be forced to spend retrying the penalty phase of this Defendant's trial is the price our continued freedom and independence demand.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CAUSE NO.
	§	CA3-77-0544-F
W. J. ESTELLE, JR.,	§	
DIRECTOR,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS,	§	
et al	§	
	§	
Respondents.	§	

ORDER - Filed March 27, 1978

Respondents in this habeas corpus proceeding have moved for a new trial pursuant to Rule 59(a), Fed. Rules of Civ. Pro., 28 U.S.C.(1970). Although there generally is no trial in the first place in a habeas proceeding Rule 59 is nevertheless applicable. *Forbes v. Wainwright*, 425 F.2d 724 (5th Cir. 1970).

Generally a new trial will not be granted merely to relitigate old matter. *In re Southern Land Title Corp.*, 310 F.Supp. 451 (ED La.1970) A rule 59(a) motion will not be granted to enable the moving party to present a different theory than he adopted at trial. *Rue v. Fuez Construction Co.*, 103 F.Supp. 499 (D.D.C.1952)

There are basically three grounds which permit the court to grant a new trial in a non-jury matter. The grounds are: manifest error of law or fact, and newly discovered evidence. 6A J. Moore, Federal Practice, ¶59.07 at 59-94 (2d ed. 1974).

None of these grounds has been advanced by the state nor has it presented any other reason why a new trial should be granted. Accordingly, the motion should be, and hereby is, *DENIED.*

I have carefully reviewed my findings and conclusions in this case in light of the state's motion. I am keenly aware of the diverging interests concerning the life or death of Ernest Benjamin Smith. My original opinion was not hastily prepared or lightly considered. I believe it struck the proper balance between the interests of the Petitioner and the Respondent. See Dix, Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to Prediction of Dangerousness, 55 Tex. L.Rev. 1343(1977); Sharpe, The Death Penalty Punishment Hearing, 41 Tex. B.J. 253(1978).

In reviewing my opinion and final judgment I do believe several minor corrections are in order. Therefore, the final judgment should be corrected in the following manner. A period should be inserted after the word "vacated". The following language should be stricken:

> "and this case is remanded to the Texas Court of Criminal Appeals with directions to order further proceedings at the trial court not inconsistent with this court's memorandum opinion."

At page six of the memorandum opinion the following language should be stricken:

> "and accordingly this case is remanded to the Texas Court of Criminal Appeals with directions to order further proceedings at the trial court not inconsistent with this opinion. *See Gardner v. Florida*, 430 U.S. 349, 362, (1977)

Footnote "10A" should be retained after the sentence which reads: "No constitutional error has been found with respect to the guilt phase of the trial."

Finally, the Court notes with some amazement the State's heated demand for an evidentiary hearing in this case. The State was presented with every opportunity to demand such a hearing before I entered my 28 page opinion. Not only did the State not request such a hearing, it was opposed to my granting one.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

DATE March 27, 1978

United States Court of Appeals
Fifth Circuit

No. 78-1839

Ernest Benjamin Smith,
Petitioner-Appellee

v.

W. J. Estelle, Jr., Director
Texas Department of Corrections,
Respondent-Appellant

OPINION

[Printed in Appendix to Petition for Writ of Certiorari at A-1 & A-30]

Supreme Court Of The United States

No. 79-1127

W. J. Estelle, Jr., Director
Texas Department of Corrections,

Petitioner

v.

Ernest Benjamin Smith,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

March 17, 1980